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No.

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1987

LESLIE FUDGE, by her parents and next friends, SHARON FUDGE and GEORGE FUDGE; and SHARON FUDGE and GEORGE FUDGE; JENNIFER ANN MERRITT, by her parent and next friend, SANDRA M. MERRITT; and SANDRA M. MERRITT; TINA MARIE OLIVER, by her parents and next friends, ROGER OLIVER and CHRISTINE OLIVER; and ROGER OLIVER and CHRISTINE OLIVER; and RENEE VINCENT, by her parent and next friend ROSE ANN VINCENT; and ROSE ANN VINCENT,

Petitioners,

vs.

PENTHOUSE INTERNATIONAL, LTD. and BOB GUCCIONE,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTIONS PRESENTED

1. Can a state, through its libel, false light, and outrage laws, make available to parents and their children remedies to guarantee that parents can maintain their primary role in the moral and social upbringing of their children, even against First Amendment claims of publishers of a sexually explicit men's magazine who assert a right to publish a photograph and squib about the children in their publication without parental consent?

2. Do the First Amendment and this Court's holding in *Hustler Magazine v. Falwell,* 108 S. Ct. 876 (1988) bar private figures, namely elementary school girls and their parents, from bringing state-created causes of action for outrage, false light, and libel against *Penthouse: The International Magazine for Men* for publishing without the parents' permission a photograph of the children with an accompanying narrative in an issue of the magazine that is otherwise replete with stories and graphic photographs of adult sexual activity?

3. Did the United States Court of Appeals for the First Circuit properly decide as a matter of law that *Penthouse* was sufficiently such "a part of the contemporary scene" so that it "cannot be characterized as exceeding all possible bounds of decency, atrocious, or utterly intolerable in a civilized society", thus barring minor school children, and their parents, from presenting claims to a jury that the inclusion of the children's photograph and references to them, without consent, constituted the tort of the intentional infliction of emotional distress (outrage)?

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LESLIE FUDGE, by her parents and next friends, SHARON FUDGE and GEORGE FUDGE; and SHARON FUDGE and GEORGE FUDGE; JENNIFER ANN MERRITT, by her parent and next friend, SANDRA M. MERRITT, and SANDRA M. MERRITT; TINA MARIE OLIVER, by her parents and next friends, ROGER OLIVER and CHRISTINE OLIVER, and ROGER OLIVER and CHRISTINE OLIVER; and RENEE VINCENT, by her parent and next friend ROSE ANN VINCENT; and ROSE ANN VINCENT,

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PENTHOUSE INTERNATIONAL, LTD. and BOB GUCCIONE,

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit, *Fudge, et al. v. Penthouse International, Ltd., et al.*, is reported at 840 F.2d 1012 (1988), a copy of that opinion is reproduced in the Appendix hereto. The opinion of the United States District Court for the District of Rhode Island was rendered on June 4, 1987 and is unreported. The District Court granted the motion of the defendants below (your respondents herein) to dismiss the complaint, rejecting the Report and Recommendation of the United States Magistrate submitted on February 23, 1987. Both the opinion of the District Court and the Magistrate's Report are included in the Appendix.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the First Circuit was entered on March 1, 1988. There was no request for a rehearing by either party. This petition for a writ of certiorari was filed within 90 days of March 1, 1988. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

First Amendment to the United States Constitution:

> Congress shall make no law . . . abridging the freedom . . . of the press . . . .

R.I. Gen. Law. 9-1-28.1:

> (a) Right to Privacy Created. It is the policy of this state that every person in this state should have a right to privacy which shall be defined to include

any of the following rights individually . . . :

(4) The right to be secure from publicity that reasonably places another in a false light before the public;

(A) In order to recover for a violation of this right, it must be established that:

(i) There has been some publication of a false or fictitious fact which implies an association which does not exist;

(ii) The association which has been published or implied would be objectionable to the ordinary reasonable man under the circumstances.

STATEMENT OF THE CASE

This litigation began on August 25, 1986, when the four minor petitioners — one who was eight years old at the time, two who were eleven, and one who had just turned twelve — and their parents filed a complaint in the Kent County Superior Court in West Warwick, Rhode Island alleging state causes of action sounding in libel, false light and the intentional infliction of emotional distress against respondents, a corporate publisher and the individual editor-publisher of *Penthouse: The International Magazine for Men.* The respondents removed the case to the United States District Court for the District of Rhode Island on grounds of diversity, and then proceeded to file a motion to dismiss and a motion for sanctions pursuant to Rule 11 of the Federal Rules of Civil Procedure on the grounds that the action was frivolous.

The United States District Court, on June 4, 1987, rendered an opinion and entered a judgment granting respondents' motion to dismiss, but denying their claim for Rule 11 sanctions. The petitioners herein pursued an appeal to the United States Court of Appeals for the First Circuit and the respondents filed a cross-appeal on their Rule 11 claim.

On March 1, 1988, the Court of Appeals affirmed the decision of the United States District Court and your petitioners now seek to have this Court issue its writ of certiorari to the United States Court of Appeals for the First Circuit regarding that portion of its opinion affirming the District Court's dismissal of the complaint. At this point, there is nothing before this Court regarding respondents' Rule 11 cross-appeal or the judgment of the Court of Appeals that such a motion could not be supported.

The facts in this matter are simple, and the respondents filed nothing by way of pleadings or affidavits in the District Court to controvert the allegations set forth in petitioners' complaint.

In November 1985, the minor petitioners and other students at the Oakland Beach Elementary School in Warwick, Rhode Island became involved in a dispute with school officials regarding the issue of segregating the sexes at recess time. The controversy attracted the attention of the media and articles were written in the Providence Journal-Bulletin, a newspaper of general circulation, and reports were carried over the wires by the Associated Press. A photograph of the minor petitioners showing them making a thumbs-down gesture was also printed locally and circulated in other newspapers around the country.

Five months later, in April 1986, the respondents, Penthouse Magazine, Ltd. and its editor-publisher, Bob Guccione, printed the photograph in a section of their magazine called "Hard Times". Beneath the photograph, there was a bold-type headline

"Little Amazons Attack Boys" and beneath the headline appeared a short narrative:

> The Oakland Beach Elementary School in Warwick, Rhode Island, has segregated recesses to protect the boys from the girls. 'They kick them in the shins, pull their hair, and kick them . . . well, in various places' said the principal. The fights have been occurring daily since the school year began. An eleven-year-old boy said, 'they beat us up all the time. I've been kicked where it counts'. *The Register-Guard* — submitted by Michael Biedermann, Springfield, Oreg.
>
> In the battle of the sexes, we'd certainly score this round for the girls — editor.

No attribution appeared directly under the photograph.

The petitioners pled, among other things, that the headline and narrative were factually incorrect. They specifically attacked the label "amazons" that had been applied to them by the respondents, alleging that they did not have the "masculine characteristics" that the dictionary definition of that word imputes. Additionally, they claimed — and so pled — that the respondents had used the very same term — "amazon" — in another article in the magazine to describe a sexually insatiable female whose desires could only be quelled by inserting a vibrator into her vagina.

The petitioners, as plaintiffs below, included a count in their complaint seeking damages pursuant to the Rhode Island "False Light" statute. R.I. Gen. Law 9-1-28.1 provides, in pertinent part:

> (a) Right to Privacy Created. It is the policy of this state that every person in this state should have

> right to privacy which shall be defined to include any of the following rights individually . . . :
>
> (4) The right to be secure from publicity that reasonably places another in a false light before the public;
>
> (A) In order to recover for a violation of this right, it must be established that:
>
> (i) There has been some publication of a false or fictitious fact which implies an association which does not exist;
>
> (ii) The association which has been published or implied would be objectionable to the ordinary reasonable man under the circumstances;
>
> (B) The fact which was disclosed need not be of any benefit to the discloser.

The petitioners claimed that the publication of their photograph and the accompanying narrative in *Penthouse* implied a connection with that magazine and its philosophy that does not exist in fact.

Lastly, the petitioners asserted that the publication of the photograph, the "amazon" headline, and the narrative in *Penthouse: The International Magazine for Men* gave rise to a cause of action for the intentional infliction of emotional distress. More specifically, your petitioners pled:

> Defendants knew, or should have known, that the

> publication of pictures of your minor plaintiffs in a so-called men's magazine amidst textual and photographic material dealing primarily with explicit and graphic descriptions of sexual activity, including intercourse, fellatio and cunnilingus, as well as photographs treating of the same subject matter, as well as close-up photographs of both male and female genitalia, some in a state of sexual arousal, and some photos suggesting or depicting masturbation, would necessarily offend, embarrass, shock, and outrage both the parents of the children whose photographs appeared in the magazine, as well as the children themselves upon being confronted by people who saw or heard about their pictures appearing in '*Penthouse: The International Magazine for Men . . .*'

Complaint, ¶ 17 at 46a.

In their complaint, the petitioners also asserted that the April 1986 issue of *Penthouse,* in which the children's photo appeared, was obscene as defined by R.I. Gen. Law 11-31-1, *et seq.* (Complaint, ¶ 14 at 44a-45a).

The magistrate who first considered the motion to dismiss filed a report and recommendation (Appendix at 36a) recommending that the trial judge deny the motion. He rejected the contention of the respondents below that the term "amazon" was neither "false nor defamatory" as a matter of law:

> Plaintiffs, however, have alleged that the term "amazon" was published in the same issue of *Penthouse* that plaintiffs appeared in to describe a female in a manner which clearly exceeds the bounds of the historical definition offered by

> Defendants in support of their Motion. Thus, it appears that the Defendants have not shown beyond doubt that the Plaintiffs can prove no set of facts in support of their claim which would entitle them to relief.

Magistrate's Report and Recommendations at 37a-38a.

Regarding the tort claims of false light and outrage, the magistrate concluded that such questions as whether the publication implied associations that "would be objectionable to the ordinary reasonable man under the circumstances" and whether "Defendants acted outrageously or intentionally" were matters of fact to be resolved by the jury.

The District Court rejected the Magistrate's Report and Recommendation, holding as a matter of law that the use of the word "amazon" in another article in the magazine to describe a sexually insatiable female could not be imputed by a reader to the term "amazons" used in the headline describing the school children. Similarly, regarding the petitioners' claim of intentional infliction of emotional distress, the trial judge declared: "It is likewise not up to the Court to consider the tenor of the objectionable magazine."

From this opinion and judgment of the United States District Court for the District of Rhode Island, your petitioner pursued an appeal to the Court of Appeals for the First Circuit. That Court agreed with the District Court's holding regarding the libel claim, concluding that the term "amazon" in the headline was an expression of opinion and declaring as a matter of law that a jury could not consider the relationship between the word "amazon" as used in the article about the sexually insatiable female and the term used in the headline. 840 F.2d at 1016. The headline "amazons" said the Court of Appeals, "was not an

assertion of fact but instead the statement of an opinion". 840 F.2d at 1016.

Regarding petitioners' false light claims, the Court of Appeals declared that because "the photograph and narrative were clearly identified as having come from a third party rather than plaintiffs themselves. . . . It follows that the article as a whole was not reasonably capable of bearing the implication of objectionable association attributed to it by plaintiffs". 840 F.2d at 1020.

It is on the count brought by petitioners alleging the intentional infliction of emotional distress where the District Court and the Court of Appeals part company. Where the District Court had said that the contents of the entire magazine were irrelevant and should not be considered, the Court of Appeals held that even if petitioners' description and characterization of the magazine in their complaint was true, they still had not stated a cause of action. Indeed, the petitioners had pled that the magazine contained throughout pictures and articles dealing with adult sexual activity, including fellatio and cunnilingus, masturbation, and contained photographs of the genitalia of both sexes, some in a state of sexual arousal, and that as a result of the appearance of the children's pictures in the magazine, along with the headline and accompanying article, all of the petitioners "had suffered embarrassment, humiliation, and shame, have experienced physical pain and upset, and have also experienced great pain and suffering of body and mind . . .". Rejecting Count III of the Complaint, the Court of Appeals opined:

> Accepting as true all of the factual allegations of plaintiffs' complaint, we conclude that those facts do not allege conduct that is sufficiently extreme and outrageous to warrant the imposition of liability. The essence of plaintiffs' complaint is that the mere publication of a photograph of the girls in a sexually explicit magazine was extreme and

> outrageous. There is nothing false, misleading, suggestive, or inherently offensive or shocking about the photograph itself; plaintiffs merely object to the material that appeared in the neighboring pages. Magazines such as *Penthouse* are sufficiently a part of the contemporary scene that their reprinting of relatively innocuous news items or photographs that have already appeared in other media simply cannot be characterized as exceeding all possible bounds of decency, atrocious, or utterly intolerable in a civilized society.

840 F.2d at 1021.

Accordingly, the Court of Appeals affirmed the decision of the United States District Court and awarded the respondents their costs.

REASONS FOR GRANTING THE WRIT

I.

Because the First Circuit has ruled as a matter of law that so-called adult, sexually graphic magazines cannot be considered by the trier of fact to assess the merits of a false light or outrage claim, while the Fifth Circuit has declared that the entire sexually-oriented publication containing an otherwise true squib about a false light plaintiff is most relevant, there is a conflict in the Circuits to be resolved by this Court.

In the instant matter, your petitioners, in asserting their false light and outrage claims, pled that the entire character of the publication in which the photograph and short article about the children appeared was germane to their claims. In holding their false light claim to be groundless, the Court of Appeals for the First Circuit said, in effect, that the respondents had isolated themselves from any liability by attributing their obtaining the article to an outside source; and on the outrage count, the Court of Appeals said that *Penthouse* and its genre were such a well-established part of the cultural landscape that no reasonable person should be outraged or humiliated by having his or her photograph appear in the magazine, so long as the photograph and accompanying narrative were not in themselves offensive. 840 F.2d at 1021. Your petitioners submit that this conclusion on the part of the Court of Appeals disregards the holding of *Miller v. California,* 413 U.S. 15, 30-31 (1973) that our adversary system has "historically permitted triers of fact to draw on the standards of the community."

The Fifth Circuit took a totally divergent approach in a very similar case. In *Braun v. Flynt,* 726 F.2d 245 (5th Cir.), *cert. denied,* 469 U.S. 883 (1984), the United States Court of Appeals for the Fifth Circuit reviewed a District Court matter that had

proceeded to a jury on a false light claim, and in which one of the appellate issues was the propriety of the trial judge submitting an entire issue of *Hustler* magazine to the jury in order to let that body determine whether the publication of true and innocuous facts about the plaintiff, along with her photograph, placed her in a false light. Jeannie Braun had the unusual, but lawful, occupation of performing in a novelty act at an amusement park with a pet pig. 726 F.2d at 247. *Chic* magazine, a publication containing "numerous explicit photographs of female genitalia", which the Fifth Circuit characterized as "a glossy, oversized, hard-core men's magazine", saw fit to run a picture of Ms. Braun and her pet pig, along with a short comment in one of its issues. 726 F.2d at 247. Neither the picture nor the commentary were, by themselves, obscene or libelous, but Ms. Braun prevailed on her false light claim, as she was able to demonstrate to the satisfaction of the jury that her involuntary appearance in *Chic* magazine caused her actionable humiliation and emotional distress.

Rejecting the contention of *Chic* magazine that the jury should have been permitted to examine only the offending photo and accompanying squib, and not the entire publication, the Fifth Circuit declared:

> Although *Chic* urges the contrary position, we hold that the evidence in this case supports the conclusion that the publication of Ms. Braun's picture in the 'Chic Thrills' section of the magazine was fully capable of conveying a false impression of Ms. Braun. Similarly, we are unpersuaded by *Chic's* argument that no reasonable person would find the publication of Ms. Braun's picture in that context to be both false and highly offensive. Having examined the evidence presented, we hold that a reasonable person could have arrived at the

same conclusions as did the jurors in this case.

726 F.2d at 253.

Like Ms. Braun, the minor petitioners in this matter and their parents are private figures who did not in any way consent to being depicted in a "men's" magazine. Similarly, the photograph in the instant matter and the narrative about the children, standing by themselves, are clearly not obscene or even vulgar. However, the situation now obtaining relative to a conflict in the Circuits is that the Fifth Circuit will allow a plaintiff to proceed to a jury with a claim that an involuntary appearance in a magazine primarily devoted to graphic depictions and descriptions of adult sexual activity constitutes one or another state-created tort, while the First Circuit will not.

In this matter, the United States Court of Appeals considered *Braun v. Flynt,* but determined that the fact that *Penthouse* had attributed the source of its information and photograph about the girls to one of its readers to be of overriding legal significance. 840 F.2d at 1020. Your petitioners respectfully submit that it is a matter of fact for the jury to determine whether this attribution divorces the petitioners from any association with *Penthouse* so as to cause their false light claim to fail. On the other hand, attribution to a third party should be absolutely irrelevant to their intentional infliction of emotional distress claim, as it was solely the respondents who determined to include the photo, headline, and narrative in the April 1986 issue of *Penthouse.*

II.

The decision below is clearly erroneous in that it ignored the tender years of your minor petitioners and disregarded the numerous holdings of this Court clearly enunciating the primary role of parents in the moral and social development of their children, even in the face of the mandate of the First Amendment.

The parents of elementary school children have a liberty interest in the moral and social development of their children, but the Court of Appeals for the First Circuit (and also the United States District Court) ignored the petitioners' oral and written arguments on this point.

The petitioners had contended throughout this matter that this Court has said time and again that the family as a social institution pre-dates the Constitution and that the integrity of family life and the primary role of parents as supervisors of the moral and intellectual growth of their children enjoy constitutional protection.

"This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition." *Wisconsin v. Yoder,* 406 U.S. 205, 232 (1972).

Two parallel lines of cases decided by this Court have coalesced to create this doctrine regarding the primacy of the parent. One line of cases makes it clear that not even government officials may intrude into the parental sphere at will. *See, e.g., Moore v. East Cleveland,* 431 U.S. 494 (1977); *Wisconsin v. Yoder, supra; Pierce v. Society of Sisters,* 258 U.S. 510 (1925). The other line of cases holds that private individuals may not transgress upon parental authority in this area; and more important, state and local governments may permissibly enact laws or implement policies to further the interests of parents regarding the upbringing

of their children. *See, e.g., Hazelwood School District v. Kuhlmeier,* 108 S. Ct. 562 (1988); *Bethel School District v. Fraser,* 478 U.S. ____, 106 S. Ct. 3159 (1986); *FCC v. Pacifica Foundation,* 438 U.S. 726 (1978); *Ginsberg v. New York,* 390 U.S. 629 (1968).

The Court of Appeals made no reference to *Ginsberg, supra,* or to any of the decisions of this Court that have balanced the parameters of the First Amendment against the liberty interests of parents, and those serving *in loco parentis,* in the rearing of children. *Ginsberg v. New York,* of course, held that a state could constituionally make it a crime to sell sexually explicit, though non-obscene, material to minors. The petitioners here call the Court's attention to an explanatory proposition:

> *The Legislature could properly conclude that parents* and others, teachers for example, who have this primary responsibility for children's well-being *are entitled to the support of laws designed to a discharge of that responsibility.*

390 U.S. at 639 (emphasis supplied).

R.I. Gen. Law 11-31-10, Sale or Exhibition to Minors of Indecent Publications, is an almost verbatim counterpart of the statute held to be valid in *Ginsberg;* and thus, in the instant matter, we have the anomolous situation that the respondents could be found guilty of a crime if they sold their magazine to your minor petitioners, but they are free from any civil action being brought against them for displaying the children's photograph in its pages. Your petitioners submit that the government of Rhode Island, through its legislature in the area of false light and invasion of privacy (R.I. Gen. Law 9-1-28.1) and its Supreme Court in the domain of libel [*DeCarvalho v. DaSilva,* 414 A.2d 806 (R.I. 1980)] and outrage [*Champlin v. Washington Trust Co.,* 478 A.2d 985

(R.I. 1984)], has established remedies, not unlike the legislation in *Ginsberg*, the statute and administrative regulations in *FCC v. Pacifica Foundation, supra,* and the school board policies in *Hazelwood School District v. Kuhlmeier, supra,* and *Bethel School District No. 403 v. Fraser, supra,* fashioned to allow parents to protect their children from exposure to sexually explicit materials and expressional activity.

To put it as simply as possible — by what authority do respondents claim the right to use four pre-teenage girls — who are clearly private figures — in an attempt at humor in a "girlie" magazine that respondents themselves proudly bill as *The International Magazine for Men?* The answer — it is submitted — is that there is no such authority, not even the First Amendment, as the foregoing decisions of this Court show that the states may create vehicles that guarantee parents relief against those who would intrude into their domain of the moral and social upbringing of their children, even against those who would claim an access to children grounded in the First Amendment.

Though the petitioners below pled in their complaint that the April 1986 issue of *Penthouse* violated the strictures of the Rhode Island obscenity statute, R.I. Gen. Law 11-31-2, *et seq.* there was certainly no attempt in this litigation to bar the distribution of this issue of *Penthouse.* What petitioners are contending is that while the respondents and their colleagues in the adult magazine industry may lampoon, or even ridicule, Jerry Falwell and other public figures, if they choose to aim their barbs in the direction of elemetary school children, they will find themselves in front of a jury answering to causes of action based in state tort law.

"The prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance." *New York v. Ferber,* 458 U.S. 747, 758 (1982). That declaration

by this Court was made in a child pornography case, and that particular issue is not present here; however, petitioners do not hesitate to say that the depiction of minor children in a magazine otherwise filled with graphic pictures of genitalia, fornication, fellatio, and cunnilingus results in the same feelings of outrage, humiliation, powerlessness, and a lack of self-esteem that are regularly described as the symptoms of the child abuse victim. 458 U.S. at 758 (fn. 9).

III.

The decision by the Court of Appeals for the First Circuit that private individuals cannot maintain an action under state tort law for the intentional infliction of emotional distress when they are presented in a purportedly humorous or ironic manner in an adult men's magazine presents the important but as yet unanswered question of whether the standard of analysis shall be different from that applied to public figures, as in *Hustler Magazine v. Falwell,* 108 S. Ct. 876 (1988).

Little more than two months ago, this Court decided that Jerry Falwell, a minister who had frequently commented on public questions, could not maintain a state-created cause of action for the intentional infliction of emotional distress against a "men's magazine" that had parodied him in a cartoon, holding that the First Amendment protection enjoyed by the publication, coupled with Falwell's public figure status, made such relief unavailable. *Hustler Magazine v. Falwell,* 108 S. Ct. 876, 882-883 (1988). To sustain such a claim, this Court said, a public figure must prove that "the publication contains a false statement of fact which was made with 'actual malice' . . .". 108 S. Ct. at 882.

The petitioners herein now call upon this Court to determine whether the same standard shall apply to private figures — some of whom are of tender years — or whether they must simply prove to the satisfaction of a jury that the mere placing of their photo and a narrative description in a particular magazine meets the standard for the tort of the intentional infliction of emotional distress. Regarding that tort, the Supreme Court of Rhode Island has clearly set forward the required elements:

> (1) The conduct must be intentional or in reckless disregard of the probability of causing emotional distress, (2) the conduct must be extreme and

> outrageous, (3) there must be causal connection between the wrongful conduct and the emotional distress, and (4) the emotional distress question must be severe.

Champlin v. Washington Trust Co., 478 A. 2d 985, 989 (R.I. 1984).

It is respectfully submitted by the petitioners that it is within the province of the jury — and not the trial court — to determine whether the ironic, humerous, satirical, etc. display of private individuals in a magazine containing a plethora of articles and graphic photographs pertaining to the adult genitalia and sexual conduct is "in reckless disregard of the probability of causing emotional distress" and is "extreme and outrageous", etc. A jury would certainly be able to examine the nature and status of private figure plaintiffs in such matters, and could consider what role the age, educational background, and employment of a plaintiff would have in the totality of the circumstances. One might assume, for example, that children and their parents might be more distressed then would be a veteran trial lawyer, albeit one who maintained private figure status.

In asking this Court to review a matter involving a private figure claim, your petitioners are placing themselves in the tradition of legal development that this Court followed after its landmark decision in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) when in such public-private controversies as *Gertz v. Welch Inc.*, 418 U.S. 323 (1974); *Time, Inc. v. Firestone*, 424 U.S. 448 (1976); and *Wolston v. Reader's Digest Assoc., Inc.*, 443 U.S. 157 (1979), it explained the limits of the *Times* holding, and provided direction for lower courts and litigants.

CONCLUSION

Your petitioners respectfully submit that the foregoing points and authorities should cause this Court to exercise its discretion and direct its writ of certiorari to the United States Court of Appeals for the First Circuit so that this matter may be placed before this Court for a full review of the merits of the case. Such a review will permit this Court to resolve a conflict in the Circuits and to enunciate for the first time standards to govern state-created tort claims brought by child private figures against publishers of adult magazines.

Respectfully submitted,

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APPENDIX A — DECISION OF UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Leslie FUDGE, et al.,

Plaintiffs-Appellants,

v.

PENTHOUSE INTERNATIONAL, LTD., et al.,

Defendants-Appellees.

Leslie FUDGE, et al.,

Plaintiffs-Appellees,

v.

PENTHOUSE INTERNATIONAL, LTD., et al.,

Defendants-Appellants.

Nos. 87-1610, 87-1624

United States Court of Appeals,
First Circuit

Argued Dec. 11, 1987.

Decided March 1, 1988

Stephen J. Fortunato, Jr., with whom Fortunato & Salvadore, Providence, R.I., was on brief, for plaintiffs, appellants.

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Jeffrey H. Daichman, with whom Grutman Miller Greenspoon & Hendler, Washington, D.C., Dennis J. Roberts, II, and Roberts, Carroll, Feldstein & Tucker, Providence, R.I., were on the brief, for defendants, appellees.

Before COFFIN, TORRUELLA and SELYA, Circuit Judges.

COFFIN, Circuit Judge.

Four schoolgirls in the eight-to-twelve-year-old range and their parents brought this action alleging that Penthouse magazine's publication of a story involving the girls was libelous, portrayed them in a false light, and constituted the intentional infliction of emotional distress. The district court granted Penthouse's motion to dismiss the complaint but denied Penthouse's motion seeking sanctions against plaintiffs and their attorney for frivolous litigation. Both parties appeal. We affirm the district court in all respects.

I.

Plaintiffs' complaint alleged the following facts, which for the purposes of a motion to dismiss we must accept as true. In the fall of 1985, Leslie Fudge, Jennifer Ann Merritt, Tina Marie Oliver, and Renee Vincent were all students at the Oakland Beach Elementary School in Warwick, Rhode Island. In November of that year, because of apparent conflicts between some of the school's male and female students, the school's principal decided to segregate the sexes during recess periods. The *Providence Journal-Bulletin* ran an item on the story, along with a photograph showing the four girls giving the thumbs-down sign to show their disapproval of the principal's decision. The story and the picture were soon picked up by the Associated Press.

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Five months later, in April of 1986, *Penthouse* magazine, which describes itself as "The International Magazine for Men," printed a slightly cropped version of the photograph that had originally appeared in the *Journal-Bulletin*, along with a one-paragraph story, under the headline "Little Amazons Attack Boys." The story appeared on page 144, in a section of the magazine entitled "Hard Times" and subtitled "A compendium of bizzare, idiotic, lurid, and ofttimes witless driblets of information culled from the nation's press." The story, which plaintiffs did not attach to their complaint, read in its entirety as follows:

The Oakland Beach Elementary School in Warwick, Rhode Island, has segregated recesses to protect the boys from the girls. "They kick them in the shins, pull their hair, and kick them . . . well, in various painful places," said the principal. The fights have been occurring daily since the school year began. An 11-year-old boy said, "They beat us up all the time. I've been kicked where it counts." (*The Register-Guard*-submitted by Michel Biedermann, Springfield, Oreg.)

In the battle of the sexes, we'd certainly score this round for the girls.—Editor

Plaintiffs alleged that on page 72 of the same issue of *Penthouse*, in an article entitled "Good Vibrations" by one Al Goldstein, the term "amazon" was defined as "a sexually aggressive and insatiable female whose desires can only be quelled and satisfied" through the use of mechanical devices.

The girls and their parents filed this action in Rhode Island Superior Court against Penthouse International, Ltd., which owns the magazine, and Bob Guccione, the magazine's editor and

publisher (hereinafter referred to collectively as "Penthouse"). The complaint alleged that the term "amazon" was libelous, that the article presented plaintiffs in a false light, and that the publication in a sexually-explicit men's magazine of the photograph of the girls constituted the intentional infliction of emotional distress. Penthouse removed the action to the federal district court based on diversity of citizenship. Penthouse then moved to dismiss the complaint for failure to state a claim and moved for Rule 11 sanctions for frivolous litigation. The district court granted the motion to dismiss but denied the motion for sanctions. All parties now appeal.

II.

We first consider plaintiffs' claim that the district court erred in considering a copy of the article itself in ruling on the motion to dismiss. Plaintiffs did not attach a copy of the article to their complaint; rather, Penthouse submitted the article in support of its motion to dismiss. Plaintiffs assert that under Fed.R.Civ. P. 12(b), the district court should either have excluded the article—as a "matter[] outside the pleading"—or treated the motion to dismiss as one for summary judgment and afforded plaintiffs an opportunity to submit additional evidentiary materials. *See Medina v. Rudman,* 545 F.2d 244, 247 (1st Cir. 1976), *cert. denied,* 434 U.S. 891, 98 S.Ct. 266, 54 L.Ed.2d 177 (1977).[1]

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1. We note that "any error in failing to give express notice [may be] harmless when the opponent has received the affidavit and materials, has had an opportunity to respond to them, and has not contradicted their accuracy." *Moody v. Town of Weymouth,* 805 F.2d 30, 31 (1st Cir. 1986) (per curiam). But we need not decide whether that standard is applicable here, because we hold, *infra,* that the district court properly considered the article as a part of plaintiffs' complaint.

We think the district court acted properly. Although "there is no requirement that the pleader attach a copy of the writing on which his action or defense is based[,] . . . when plaintiff fails to introduce a pertinent document as part of his pleading, defendant may introduce the exhibit as part of his motion attacking the pleadings." 5 C. Wright & A. Miller, *Federal Practice and Procedure* § 1327 at 489 (1969) (citations omitted); *cf. Ed Miniat, Inc. v. Globe Life Ins. Group, Inc.*, 805 F.2d 732, 739 n. 12 (7th Cir.1986), *cert. denied*, ____U.S.____, 107 S.Ct. 3188, 96 L.Ed.2d 676 (1987).

Clearly, not every document referred to in a complaint may be considered incorporated by reference and thus introduced by the moving party in support of a motion to dismiss. *See Goldman v. Belden*, 754 F.2d 1059, 1066 (2d Cir.1985) ("[L]imited quotation does not constitute incorporation by reference."); *Seidel v. Public Service Co. of New Hampshire*, 616 F.Supp. 1342, 1353 (D.N.H.1985). But here the article was not merely referred to in plaintiffs' complaint but was absolutely central to it. Plaintiffs unquestionably would have had to offer a copy of the article in order to prove their case. Moreover, plaintiffs did not and do not challenge the authenticity of the copy of the article submitted to Penthouse. Finally, plaintiffs suffered no prejudice from their lack of opportunity to submit additional evidentiary materials. Nothing they could have introduced could have affected the disposition of the purely legal questions that the motion to dismiss raised about the article itself. We therefore see no obstacle to the district court's or our consideration of the article.

III.

As each of plaintiffs' claims raises different legal issues, we proceed by discussing those claims *seriatim*, beginning with the

libel claim and then moving on to the false light and emotional distress claims.

A. The Libel Claim

We think it important to begin by setting forth the exact allegations of plaintiffs' complaint. First, plaintiffs alleged that the term "amazon" was defamatory because it imputed to the girls, who are of elementary school age, "criminality in the form of sexual activity and a lack of chastity, when, in fact, they are chaste." Second, plaintiffs alleged that the term defamed them because it "historically had, and presently has, the connotations of 'masculine woman' and 'shrew,' [when in fact] none of your minor plaintiffs have any characteristics inappropriate to their sex and age group." Third, plaintiffs alleged that the term was defamatory because it was defined in another article in the same issue of *Penthouse* as a sexually aggressive and insatiable female who uses a mechanical device for her gratification.

Under Rhode Island law, one of the elements of a libel claim is "a false and defamatory statement concerning another." *Healey v. New England Newspapers, Inc.*, 520 A.2d 147, 149 (R.I.1987). Penthouse argued below, and the district court agreed, that the libel claim should be dismissed on the ground that the term "amazon" could not possibly be "false" because it was a constitutionally-protected statement of opinion. "Under the First Amendment there is no such thing as a false idea." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339, 94 S.Ct. 2997, 3006, 41 L.Ed.2d 789 (1974). If the challenged statement is one of opinion rather than fact, then under the First Amendment it generally cannot give rise to a defamation claim. *See Greenbelt Cooperative Publishing Ass'n v. Bresler*, 398 U.S. 6, 90 S.Ct. 1537, 26 L.Ed.2d 6 (1970); *McCabe v. Rattiner*, 814 F.2d 839, 841 (1st Cir. 1987);

Healey, 520 A.2d at 150; *cf. Old Dominion Branch No. 496, Nat's Ass'n of Letter Carriers v. Austin,* 418 U.S. 264, 284, 94 S.Ct. 2770, 2781, 41 L.Ed.2d 745 (1974). The determination whether a printed statement is protected opinion or an unprotected factual assertion is a matter of law for the court. *Ollman v. Evans,* 750 F.2d 970, 978 (D.C. Cir.1984) (en banc), *cert. denied,* 471 U.S. 1127, 105 S.Ct. 2662, 86 L.Ed.2d 278 (1985). In making this determination, we "examine the statement itself, the article as a whole, and its social context. . . " *McCabe,* 814 F.2d at 842. We turn now to a discussion of these three factors.

Turning first to the statement itself, we note that the word "amazon", like the word "scam" in *McCabe, id.,* does not have a single precise meaning. The pertinent dictionary definitions of "amazon" are (1) "one of a race or nation of female warriors usu[ally] associated with Scythia or Asia Minor with whom the ancient Greeks of mythology repeatedly warred," (2) "a female warrior," or (3) "a tall strong masculine woman." *Webster's Third New International Dictionary* 66 (1981).

None of these definitions imputes criminality or sexual conduct, thus negating plaintiffs' first theory of why the term is defamatory. As for plaintiffs' second theory—that the term is defamatory because it means "masculine woman"—we do not think that the phrase "masculine woman" is capable of any more precise a definition than "amazon." There is a sufficiently wide spectrum of reasonable opinion as to what constitutes appropriate gender-correlated behavior for schoolgirls that it would be impossible to prove the truth or falsity of the statement that the girls are "masculine women." *Cf. McCabe,* 814 F.2d at 842.

Plaintiffs' third theory is that the term as used in the headline on page 144 is defamatory because it is defined in another article

on page 72 of the same issue of *Penthouse* as a sexually aggressive and insatiable female who uses mechanical means for her gratification. Accepting as true the allegation as to what appears on page 72, we think it only strengthens the conclusion that the term has no one precise meaning, that it is used sometimes literally and sometimes figuratively, and thus that its application to the girls cannot be shown to be either true or false. If the magazine has expressly indicated that the term as the editor used it in the headline was meant to be read together with another author's definition of the term in another, wholly unrelated article appearing 72 pages away our conclusion might be different.[2] Absent any such indication, we do not think plaintiffs are entitled to pick and choose from among the various possible definitions of "amazon" and fasten upon the most obscure and esoteric definition simply because they find it the most offensive.

We therefore conclude that the characterization of the girls as "amazons," considered by itself, was not an assertion of fact but instead the statement of an opinion. It was "no more than rhetorical hyperbole. . ." *Greenbelt Cooperative Publishing Ass'n v. Bresler,* 398 U.S. at 14, 90 S.Ct. at 1542.

A reading of the article as a whole strengthens our conclusion that the term "amazon" was an expression of opinion. The article merely narrates, in a fashion intended to be humorous, the playground skirmishes and the principal's decision to separate

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2. We note, however, that in *Letter Carriers,* a union newsletter labeled plaintiffs as "scabs" and on the same page defined a "scab" as a "traitor to his God, his country, his family and his class." 418 U.S. at 267-68, 94 S.Ct. at 2773. The Court nevertheless held that the context made clear that plaintiffs were not literally being accused of treason. *Id.* at 284-86, 94 S.Ct. at 2781-82. Thus a libel defendant's own definition of an allegedly libelous term does not require a court to ignore context in making the fact-opinion distinction.

the sexes. Nothing in the article mentions or suggests any sort of sexual conduct. Its description of girls attacking boys suggests that "amazon" was used in the sense of "female warrior" and even then only in an exaggerated, satirical manner. And plaintiffs' complaint does not challenge either the accuracy of the narrative or the use of "amazon" in its sense of "female warrior."

Finally, we look at the broader social context in which the allegedly defamatory statement appeared. As the District of Columbia Circuit has stated, "[s]ome types of writing or speech by custom or convention signal to readers or listeners that what is being read or heard is likely to be opinion, not fact." *Ollman v. Evans*, 750 F.2d 970, 983 (D.C.Cir.1984) (en banc), *cert. denied*, 471 U.S. 1127, 105 S.Ct. 2662, 86 L.Ed.2d 278 (1985). We think that *Penthouse's* "Hard Times" column, in which the article about the girls appeared, is an example of a well-organized genre: articles or fragments gleaned from the nation's press, appearing under satirical headlines penned by a magazine's editors and followed by the editors' wry comments. Sometimes the editors' barbs are directed at the substance of the story, sometimes at the manner in which it was covered or not covered, and sometimes at bizarre or unfortunate typographical errors. This genre is by now common enough, across a broad spectrum of publications, that the average reader understands that the headline is the editors' ironic comment upon, rather than a literal representation of, what appears in the story reprinted from another source. Here, the editors' use of this genre, and their closing comment that "[i]n the battle of the sexes, we'd certainly score this round for the girls," clearly signalled the reader that the headline "Little Amazons Attack Boys" was satirical opinion rather than serious fact.

We also think it significant that the offending headline appeared in a magazine rather than a newspaper or some other

publication. As the Eighth Circuit has observed, "[t]he magazines have a tradition of more colorful, even feisty language, than do dailies; they are also required to condense to a few paragraphs those issues to which local papers devote days of coverage and thousands of inches of space." *Janklow v. Newsweek, Inc.*, 788 F.2d 1300, 1304 (8th Cir.), *cert. denied*, ____U.S.____, 107 S.Ct. 272, 93 L.Ed.2d 249 (1986). Here, as in *Janklow*, "the magazine's generally freer style of personal expression . . . would signal the reader to expect a fair amount of opinion." *Id.*

There is another sense in which the larger social context suggests that the headline was a statement of opinion rather than of fact. We must acknowledge that at present there is a great deal of debate and disagreement in our society about whether and how gender affects and ought to affect behavior. Whether or not the playground incidents themselves could be characterized as matters of public concern, they certainly could be thought to implicate that larger theme. And the reader would certainly understand, after reading the editor's satirical remark about the battle of the sexes, that the editor had included the article because it described a reversal of typical sex roles. In the charged context of a debate over a matter of public concern, the reader will expect a certain amount of hyperbole and loose characterization—in short, a certain amount of opinion. This is particularly true with respect to a headline, which is commonly understood to function primarily as an attention-getter. We have no doubt that the headline in the instant case would have been taken in this spirit.

In sum, an examination of the statement, the article, and the larger social context convinces us as a matter of law that the term "amazons" was a constitutionally-protected expression of opinion. The district court therefore correctly dismissed plaintiffs' libel claim.

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B. The False Light Claim

Plaintiffs' complaint alleged that the headline, photograph, and narrative portrayed them in a false light by (1) implying that they consented to *Penthouse's* use of the photograph and narrative; (2) failing to state that the girls objected to being separated from boys at recess; (3) implying an association between the plaintiffs and *Penthouse* and an endorsement by them of *Penthouse's* editorial views; and (4) implying that the girls were masculine in nature and wished to dominate and subdue their male schoolmates.

The Rhode Island legislature has created a statutory cause of action for portrayal in a false light, as follows:

> (a) Right to Privacy Created.—It is the policy of this state that every person in this state shall have a right to privacy which shall be defined to include any of the following rights individually: . . .
>
> (4) The right to be secure from publicity that reasonably[3] places another in a false light before the public;
>
> (A) In order to recover for violation of this right, it must be established that:

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3. We are unsure whether the word "reasonably" was intended or instead was inadvertently substituted for "unreasonably." Other, similar subsections of section 9-1-28.1(a) use "unreasonably." We need not decide this question, however, as section 9-1-28.1(a)(4)(A) defines the right at issue clearly enough for our purposes.

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(i) There has been some publication of a false or fictitious fact which implies an association which does not exist;

(ii) The association which has been published or implied would be objectionable to the ordinary reasonable man under the circumstances;

(B) The fact which was disclosed need not be of any benefit to the discloser.

R.I.Gen.Laws § 9-1-28.1(a)(4) (1985 Reenactment).

The district court in the instant case concluded that because the *headline* was constitutionally-protected opinion, it could not possibly be false and thus could not meet the "false or fictitious fact" requirement of the statute. Although we agree with this characterization, we cannot agree with the district's court's conclusion that this warranted dismissing the *entire* false light claim. Plaintiffs' complaint clearly alleged that not only the headline but also the photograph and narrative portrayed them in a false light. We must therefore consider whether the photograph and the narrative can support a false light claim.

In making this determination we are hampered somewhat by the lack of any precedent concerning section 9-1-28.1(a)(4). It was enacted in 1980 and has never been discussed in any reported decision of the Rhode Island courts. In construing the statute, therefore, we tread carefully because we have little but the statutory language to guide us. We also look for analogies to the Rhode Island law of defamation, for it is widely recognized that claims for defamation and false light have much in common. *See* W. Prosser, *Law of Torts* 813 (4th ed. 1971); *Restatement (Second)*

of Torts § 652E, comment b (1976). As the Fifth Circuit has noted, "[f]ederal courts have frequently noted the similarities between the two causes of action and have often carried over elements of state defamation law into their consideration of false-light invasion claims." *Braun v. Flynt,* 726 F.2d 245, 250, 252 (5th Cir.) (citing cases), *cert. denied,* 469 U.S. 882, 105 S.Ct. 252, 83 L.Ed.2d 189 (1984).

In particular, we note the rule in Rhode Island and elsewhere that "the threshold determination of whether a statement is capable of bearing a defamatory meaning is for the court to decide. . . ." *Healey v. New England Newspapers Inc.,* 520 A.2d 147, 150 (R.I.1987) (citing *Restatement (Second) of Torts* § 614). This rule is of long standing in Rhode Island; more than ninety years ago, the Rhode Island Supreme Court stated that "if the language is not reasonably capable of conveying to the ordinary mind the defamatory meaning alleged in the innuendo, it is the province and duty of the court to so declare, and to deny the right to maintain an action thereon." *Reid v. Providence Journal Co.,* 20 R.I. 120, 122, 37 A. 637, 637 (1897).

We think it likely that the Rhode Island courts would apply a similar rule in the false light context; the court should make the threshold determination of whether a statement is capable of implying the objectionable association of which the plaintiff complains. Such a rule would serve the same salutary purposes as it does in the defamation context. Indeed, the *Restatement* explicitly suggests that some of the same restrictions applicable to defamation claims may also be applicable to false light claims. *Restatement (Second) of Torts* § 652E, comment e. The drafters note that

> When the false publicity is also defamatory so that

> either action can be maintained by the plaintiff, it is arguable that limitations of long standing that have been found desirable for the action of defamation should not be successfully evaded by proceeding upon a different theory of later origin, in the development of which the attention of the courts has not been directed to the limitations.

Id. See also Prosser at 813-14; Hill, *Defamation and Privacy Under the First Amendment,* 76 Colm.L.Rev. 1205, 1274-75 (1976). We note that a number of other courts have concluded that the court should make a threshold determination of whether the statement is capable of portraying the plaintiff in a false light. *See Braun v. Flynt,* 726 F.2d 245, 253 (5th Cir.) (applying Texas law), *cert. denied,* 469 U.S. 883, 105 S.Ct. 252, 83 L.Ed.2d 189 (1984); *Cibenko v. Worth Publishers, Inc.,*510 F.Supp. 761, 766 (D.N.J.1981) (applying New Jersey law); *Fogel v. Forbes, Inc.,* 500 F.Supp. 1081, 1088 (E.D.Pa.1980) (applying Pennsylvania law).

We therefore turn to a consideration of whether the photograph and the narrative in the instant case are reasonably capable of portraying plaintiffs in a false light. We note at the outset that a publication is actionable under section 9-1-28.1(a)(4) only if it implies "an association." Yet two of plaintiffs' allegations as to why the photograph and narrative were objectionable do not appear to imply any association at all. These allegations are (1) that the article failed to state that the girls objected to being segregated from the boys at recess, and (2) that the article implied that the girls were masculine in nature and wished to dominate and subdue their male schoolmates. Even if these allegations did involve "associations" within the meaning of the statute, we would conclude as a matter of law that these associations would not

"be objectionable to the ordinary reasonable man under the circumstances." R.I.Gen.Laws § 9-1-28.1(a)(4)(A)(ii). We therefore confine the remainder of our discussion to plaintiffs' allegations that the article implied that they had consented to publication and endorsed *Penthouse's* editorial views.

We have no difficulty in concluding that the photograph and narrative were not reasonably capable of implying either consent or endorsement. The article's placement in the "Hard Times" column, which was clearly described as "a compendium" of items "culled from the nation's press," negated any inference that *Penthouse* had obtained the photograph or narrative from the plaintiffs. Moreover, any reader who missed the magazine's description of its "Hard Times" section would have reached the same conclusion after reading the narrative itself, which was clearly labeled as having been taken from a newspaper and submitted by an Oregon reader. Finally, it is worth mentioning that *Penthouse's* editor clearly distinguished between his own comment upon the story and the story itself. Not only did he place his comment after the story and its attribution, and in a different typeface, but he expressly attributed the comment to himself. In sum, there was absolutely no room for the implication that *Penthouse* had in any way dealt with plaintiffs, or they with *Penthouse*.[4]

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4. In spite of *Penthouse's* attribution of the entire item to the Oregon reader and newspaper, plaintiffs insist that their complaint alleged that the narrative was written by the *Penthouse* editor. We find no such allegation in their complaint. In any event, such an allegation would be irrelevant to the false light claim. An attribution to another source, whether true or false, makes it equally unreasonable to infer from the face of the narrative that *Penthouse* had obtained the story directly from plaintiffs. That in turn would negate the inference, crucial to the false light claim, that plaintiffs had consented to publication or had endorsed the magazine.

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A comparison of two recent Fifth Circuit cases, decided under Texas law, supports this conclusion. In *Braun v. Flynt,* 726 F.2d 245 (5th Cir.), *cert. denied,* 469 U.S. 883, 105 S.Ct. 252, 83 L.Ed.2d 189 (1984), a photograph of and narrative concerning the plaintiff and her amusement park entertainment partner, "Ralph, the Diving Pig" were published in *Chic*, which the court described as "a glossy, oversized, hard-core men's magazine." *Id.* at 247. The item appeared in a section of the magazine known as "Chic Thrills," a collection of brief vignettes, most of which "either concerned sex overtly or were accompanied by a photograph or cartoon of an overtly sexual nature." *Id.* But nothing in the "Chic Thrills" section attributed its contents to readers or outside sources. The Fifth Circuit concluded that the evidence supported the jury's finding that the item depicted the plaintiff in a false light, on either a consent-to-publication or an endorsement-of-editorial-views theory. *Id.* at 253-54 & n. 11.

In contrast is the more recent case of *Faloona by Fredrickson v. Hustler Magazine, Inc.*, 799 F.2d 1000 (5th Cir.1986), *cert. denied,* ____U.S.____, 107 S.Ct. 1295, 94 L.Ed.2d 151 (1987). In that case, plaintiffs had consented to be photographed in the nude for two books on human sexuality. When *Hustler* published an excerpt of one book and a review of the other, both accompanied by photographs of plaintiffs, they sued, *inter alia*, on a false light theory. *Id.* at 1002-05. The Fifth Circuit affirmed the dismissal of plaintiffs' complaint. After reviewing the context, the court concluded as a matter of law that

> no reasonable person could consider the photographs as indicating plaintiffs' approval of *Hustler*, or that they were willing to pose nude for *Hustler*. It is obvious that the photographs were reproductions from the books being reviewed or

> excerpted. No tie to *Hustler* is claimed or suggested. It is this sharp definition of context which distinguishes this case from . . . *Braun*.

Id. at 1007.

The court in *Faloona* also distinguished the cases before it from *Douglass v. Hustler Magazine, Inc.*, 769 F.2d 1128 (7th Cir. 1985), *cert. denied*, 475 U.S. 1094, 106 S.Ct. 1489, 89 L.Ed.2d 892 (1986). In *Douglass*, Robyn Douglass, an actress, claimed that *Hustler* had presented her in a false light by publishing nude photographs of her and thereby implying that she had consented to the publication of the photographs. The Seventh Circuit, applying Illinois law, concluded that she had stated a claim, for portrayal in a false light.

> Nothing in the feature itself suggests that the nude photographs of her are appearing without her permission and against her will, and readers might well assume that she had cooperated in the preparation of the feature in order to stimulate interest in her films. Moreover, she had been described in a previous issue of *Hustler* as a forthcoming "Hustler celebrity-exclusive," and in another issue *Hustler's* chairman, Larry Flynt, had announced in an editorial column that he does not publish photographs of women without their consent. It is (or so a jury could find) as if *Hustler* had said, "Robyn Douglass is proud to pose nude for *Hustler* magazine."

Douglass, 769 F.2d at 1135.

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The *Faloona* court felt that the context in which the photographs were published in *Douglass* made it distinguishable from *Faloona*, where the photographs were clearly reproduced from the books being excerpted or reviewed. *Faloona,* 799 F.2d at 1007. The same is true in the case now before us, the photograph and narrative were clearly identified as having come from a third party rather than plaintiffs themselves. It follows that the article as a whole was not reasonably capable of bearing the implication of objectionable association attributed to it by plaintiffs. The district court therefore acted properly in dismissing the false light claim.[5]

C. The Emotional Distress Claim

Plaintiffs' complaint alleged that Penthouse knew or should have known that the publication of the girls' photograph in a sexually-explicit men's magazine would offend, embarrass, shock, and outrage the girls and their parents. Although the tort [sic] of intentional infliction of emotional distress is not well-established in Rhode Island, recovery is apparently possible in the debtor-creditor and employer-employee contexts for "extreme and outrageous" intentional or reckless conduct that causes severe emotional distress. *See Elias v. Youngken,* 493 A.2d 158, 163-64 (R.I. 1985); *Champlin v. Washington Trust Co.,* 478 A.2d 985, 989 (R.I.1984). For the purposes of this appeal, we assume without deciding that Rhode Island would permit recovery outside of these contexts as well. *Cf. Russell v. Salve Regina College,* 649 F.Supp. 391, 400-01 (D.R.I.1986) (concluding that Rhode Island would extend parameters of intentional infliction tort to university-student

5. This disposition makes it unnecessary for us to consider Penthouse's claim that to impose liability under the false light theory advanced by plaintiffs herein would violate the First Amendment.

relationship). We nevertheless conclude, as did the district court, that plaintiffs have failed to state an emotional distress claim.

The Rhode Island Supreme Court, in developing the law governing claims for intentional infliction of emotional distress, has relied heavily on the principles stated in *Restatement (Second) of Torts* § 46 (1964) and the comments thereto. *See Champlin,* 478 A.2d at 988-90. We assume, therefore, that Rhode Island would follow the rule stated in comment h to that section:

> It is for the court to determine, in the first instance, whether the defendant's conduct may reasonably be regarded as so extreme and outrageous as to permit recovery, or whether it is necessarily so. Where reasonable men may differ, it is for the jumry, subject to the control of the court, to determine whether, in the particular case, the conduct has been sufficiently extreme and outrageous to result in liability.

Restatement § 46, comment h. We note that the court in *Champlin* appeared to treat the question whether conduct is sufficiently extreme and outrageous as one of law. *Champlin,* 478 A.2d at 990 (seeing nothing in defendant's brief encounter with plaintiff "that could be classified as extreme and outrageous"). *Cf. Elias,* 493 A.2d at 164 (concluding that evidence did not create jury question as to whether defendant's conduct had been extreme and outrageous); *Curtis v. Rhode Island Dept. for Children and Their Families,* 522 A.2d 203, 208 (R.I.1987) (same).

The "extreme and outrageous" standard is a difficult one to meet. "Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded

as atrocious, and utterly intolerable in a civilized community." *Restatement* § 46, commend d. We must also recognize that conduct that is intentional or reckless and causes severe emotional distress does not *ipso facto* constitute extreme and outrageous conduct; as *Champlin* makes clear, 478 A.2d at 989, these are separate elements that must coincide to impose liability.

Accepting as true all of the factual allegations of plaintiffs' complaint, we conclude that those facts do not allege conduct that is sufficiently extreme and outrageous to warrant the imposition of liability. The essence of plaintiffs' complaint is that the mere publication of a photograph of the girls in a sexually explicit magazine was extreme and outrageous. There is nothing false, misleading, suggestive, or inherently offensive or shocking about the photograph itself; plaintiffs merely object to the material that appeared in the neighboring pages. Magazines such as *Penthouse* are sufficiently a part of the contemporary scene that their reprinting of relatively innocuous news items or photographs that have already appeared in other media simply cannot be characterized as exceeding all possible bounds of decency, atrocious, or utterly intolerable in a civilized society.[6]

IV.

There remains the issue of Rule 11 sanctions, requested by Penthouse against plaintiffs and their attorney and refused by the district court. Penthouse, arguing that the action was frivolous, sought to recover its attorney's fees and the costs of removing and defending the action. The district court concluded that "[t]hough plaintiffs' claims have been denied, they do not rise

6. We therefore need not consider the argument that the imposition of emotional distress liability in circumstances such as these would be barred by the First Amendment.

to the level of frivolity necessary for imposition of Rule 11 sanctions."

We review the district court's decision under Rule 11 only for abuse of discretion. *EBI, Inc. v. Gator Industries, Inc.*, 807 F.2d 1, 6 (1st Cir.1986). Here, we find none. We recognize that the costs of defending groundless claims of defamation, invasion of privacy, and/or intentional infliction of emotional distress may spur the media toward self-censorship, and we agree that Rule 11 should be sued in appropriate cases to deter such groundless claims. But the application of the doctrine of constitutionally-protected opinion is not yet clearcut, and the Rhode Island law covering false light and intentional infliction claims is not yet well settled. We therefore do not think it an abuse of discretion to conclude that this action was "warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law. . . " Fed.R.Civ.P. 11. We do, however, award Penthouse its costs on this appeal.

Affirmed; costs to appellees.

APPENDIX B—OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF RHODE ISLAND

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF RHODE ISLAND

C.A. NO. 86-0568

LESLIE FUDGE, by her parents and next friends, SHARON FUDGE and GEORGE FUDGE; and SHARON FUDGE and GEORGE FUDGE; JENNIFER ANN MERRITT, by her parent and next friend, SANDRA M. MERRITT, and SANDRA M. MERRITT; TINA MARIE OLIVER, by parents and next friends, ROGER OLIVER and CHRISTINE OLIVER, and ROGER OLIVER and CHRISTINE OLIVER; and RENEE VINCENT, by her parent and next friend ROSE ANN VINCENT and ROSE ANN VINCENT,

PLAINTIFFS

v.

PENTHOUSE INTERNATIONAL, LTD. and BOB GUCCIONE,

DEFENDANTS

OPINION

FRANCIS J. BOYLE, CHIEF JUDGE.

This action stems from Defendants' publication of a news item accompanied by a photo of the minor Plaintiffs. The minors and their parents seek compensatory and punitive damages, claiming that the piece was libelous, placed the minors in a false

light, and intentionally caused them emotional distress. Defendants have removed the case to this Court from the Superior Court of Kent County, Rhode Island. Defendants now object to the findings of the Magistrate, who recommends that Defendants' motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(6) be denied.

At the time this dispute arose, the minor Plaintiffs were students at the Oakland Beach Elementary School in Warwick, Rhode Island. In November of 1985, the male and female students were separated at recess as a result of ongoing friction on the playground. An article and photo appeared in the *Providence Journal-Bulletin*, and the story was picked up by the Associated Press. In April of 1986, a cropped version of the photo and a brief article appeared in the "Hard Times" section of *Penthouse* Magazine. Entitled, "Little Amazons Attack Boys," the one-paragraph item describes the children's aggressive behavior, and the photo clearly depicts three of the four minor Plaintiffs.[1]

Plaintiffs take issue with Defendants' use of the term "little amazons" to refer to the pictured girls. The traditional definition of "amazon" is, "[A] member of a race of female warriors battling the Greeks of mythology," or "[A] tall strong masculine woman." Webster's Ninth New Collegiate Dictionary 77 (1986). Plaintiffs point out that the term is used elsewhere in the magazine to refer to a sexually-aggressive and insatiable female. They urge the Court to consider the allegedly defamatory material in the context of the entire publication.

The "Hard Times" section of the magazine, a self-described "compendium of bizarre, idiotic, lurid, and ofttimes witless

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1. Plaintiff Leslie Fudge was cut out when the photograph was trimmed for publication.

driblets of information culled from the nation's press," features encapsulated news pieces submitted from across the country. After making its way from the *Providence Journal* to the Associated Press, the story reached *Penthouse* via an Oregon reader. Other entries on the same page of "Hard Times" feature an $18,500 bed, an 814-pound fitness author, a homosexual marine, and an inflatable Ronald McDonald which had been stolen and held for ransom.

Plaintiffs claim that Defendant's use of the term "little amazons" is libelous. The question of whether a communication is defamatory is one of law to be determined by the Court. *Elias v. Youngken,* 493 A.2d 158, 161 (R.I. 1985). A defamatory statement consists of "any words, if false and malicious, imputing conduct which injuriously affects a man's reputation, or which tends to degrade him in society or bring him into public hatred and contempt." *Id.* (quoting *Reid v. Providence Journal Co.,* 20 R.I. 120, 37 A. 637 (1897). Specifically, the elements of libel include,

> (a) a false and defamatory statement concerning another; (b) an unprivileged publication to a third party; (c) fault amounting at least to negligence on the part of the publisher; and (d) damages, unless the statement is actionable irrespective of special harm.

Healey v. New England Newspapers, Inc., 520 A.2d 147, 149 (R.I. 1987) (quoting *Lyons v. Rhode Island Public Employees Council 94,* 516 A.2d 1339, 1342 (R.I. 1986)). Defendants contend that the words "little amazons" could not possibly be false under the *Elias* definition and element (a) because the phrase constitutes a statement of opinion.

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The First Circuit recently adopted the doctrine of constitutionally-protected opinion. In *McCabe v. Rattiner,* 814 F.2d 839 (1st Cir. 1987), the use of the word "scam" to describe a condominium timesharing arrangement was seen as opinion, defeating a libel claim. The catalyst of the *McCabe* dispute was a 1984 newspaper article entitled "Selling Timesharing on the Street" in which the author gave a first-person account of negotiating a timesharing deal. The story's tone was one of dissatisfaction, and the author recounted how he and his wife did not get their free lobster dinner as was promised until they demanded it from the salesman. The plaintiff was the owner of the development, and his name was mentioned in the article. His libel charge was based on the story's jumpline, which is the headline carried over when an article is continued on another page. The jumpline read simply "Scam" and though the defendant did not choose that particular jumpline, he did believe the timesharing operation was a "scam."

In its finding that the jumpline was opinion and not a false factual statement, *McCabe* considered the importance of the distinction, stating.

> [U]nder the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error mentally advances society's interest in 'uninhibited, robust, and wide open' debate on public issues.

814 F.2d at 841 (quoting *Gertz v. Robert Welch,* 418 U.S. 323,

339-340 (1974)). *McCabe* recognized that differentiation between fact and opinion is seldom clear-cut and that, taken in context, certain factual assertions may be shielded by the First Amendment, while certain opinions may go unprotected. *Id.* at 6. Thus, the issue merits consideration of the "totality of the circumstances" surrounding a purported defamation. *Id.* As a result, *McCabe* examined the word "scam" in relation to the article it headed. Because the story was written in the first person about a matter of public concern, the Court found the jumpline to be constitutionally-protected opinion.

The *Penthouse* article at issue here is a third-person news item and reads as fact, not opinion. Defendants claim First Amendment protection not for the story itself, but for its title, "Little Amazons Attack Boys." Defendants argue that the phrase was simply a colorful way of describing the playground skirmishes and was not intended as a statement of fact. Such is apparent, Defendants claim because the word "amazon" is not readily definable. Plaintiffs contend that the dictionary definition of the word should give way to the context in which it was used elsewhere in the magazine, namely to connote a sexually-insatiable female.

To determine the meaning of the word "scam," *McCabe* referred to two United States Supreme Court decisions. In the first, *Greenbelt Cooperative Publishing Assn. v. Bresler,* 398 U.S. 6 (1970), the Court examined a newspaper article which used the term "blackmail" to describe a developer's negotiating position. The Court considered the word in the context of the article, and concluded, "[E]ven the most careless reader must have perceived that the word was no more than rhetorical hyperbole, a vigorous epithet." 814 F.2d at 841 (quoting *Greenbelt* at 14). The second case, *Letter Carriers v. Austin,* 418 U.S. 264 (1974), dealt with a list of "scabs" in a union newsletter. The Court took into

account that the word was used in connection with a heated labor dispute and found, "Such words were obviously used here in a loose, figurative sense to demonstrate the union's strong disagreement with the views of those who oppose unionization." 814 F.2d at 842 (quoting *Letter Carriers* at 284). In its decision that "scam" was a statement of opinion, *McCabe* pointed out that *Letter Carriers* reviewed the use of "scab" in "the light in which people would read a union newsletter" *Id. See also Bray v. Providence Journal Company,* 101 R.I. 111, 220 A.2d 531 (1966) (headline considered together with body of news article).

McCabe is analogous to the instant matter, but it is not dispositive. *McCabe* decided to read the jumpline in tandem with the affiliated news story, while here the question is whether to read the headline in terms of the article or the whole publication. The *McCabe* story appeared in a newspaper, a purportedly neutral forum. In this case, the allegedly libelous material was printed in a magazine which is known for its accent on female nudity and sexually-related topics. The choice of context here is outcome-determinative according to Plaintiffs' argument.

Because defamation and the false light aspect of invasion of privacy law involve similar issues, it is appropriate to define the applicable context as to Plaintiffs' libel claim by looking to cases involving false light. The two torts are by no means interchangeable, but consideration of one may guide analysis of the other. As compared in *Rinsley v. Brandt,* 700 F.2d 1304 (10th Cir. 1983),

> The false light privacy action differs from a defamation action in that the injury in privacy actions is mental distress from having been exposed to public view, while the injury in defamation

> actions is damage to reputation . . . . In most aspects, however, the two actions are similar. For example, essential to both a false light privacy claim and a defamation claim is a determination that 'the matter published concerning the plaintiff is not true' . . . . Similarly, the defense available in a defamation action that the allegedly defamatory statements are opinions, not assertions of fact, is also available in a false light privacy action.

700 F.2d at 1307 (citations omitted) (quoting Restatement (Second) of Torts § 652E comment a (1977)).

In support of their claim of constitutionally-protected opinion, Defendants assert that the headline should be read in light of "Hard Times" and not of the entire magazine. If read together with the accompanying article, Defendants argue, the title "little amazons" could not reasonably be construed as anything other than a play on words or an expression of opinion. Plaintiffs contend that the term is defamatory when read in the context of the whole issue of *Penthouse*, as "amazon" is defined by implication elsewhere in the magazine as a sexually-insatiable female.

The situation at issue is quite similar to two recent Fifth Circuit cases which reached two different results. *Braun v. Flynt*, 726 F.2d 245 (5th Cir. 1984), *reh'g denied* 731 F.2d 1205, *cert. denied* 469 U.S. 883, allowed a false light claim while *Faloona by Fredrickson v. Hustler Magazine, Inc.*, 799 F.2d 1000 (5th Cir. 1986), *reh'g denied* 802 F.2d 455, *cert. denied* 107 S.Ct. 1295, 94 L.Ed. 2d 151 (1987), refused to do so. In *Braun*, the plaintiff objected to her picture appearing in the December, 1977 issue

of *Chic*, a sexually-oriented magazine. Jeannie Braun worked at a Texas amusement park with "Ralph, the Diving Pig." Pictures and postcards of Braun and Ralph were distributed at the park with Braun's consent. In May of 1977, an editor of *Chic* saw the plaintiff's act and requested her permission to include a photo of the performance in *Chic*. The editor never mentioned that *Chic* featured female nudity and Braun, believing *Chic* to be a fashion magazine, authorized publication of the photograph.

The photo appeared in the section of the magazine entitled "Chic Thrills" a collection of current events vignettes, most of which had sexual undertones. A jury found that the defendant had placed Braun in a false light and awarded her damages.

One of the defendant's complaints on appeal was that the trial judge allowed the jury to determime the context of the photo in light of the entire issue of *Chic*, as opposed to limiting their consideration to the "Chic Thrills' segment. The Fifth Circuit held that it was proper to introduce the whole publication to the jury so that they could "be placed in the position of the ordinary reader." 726 F.2d at 254. The court noted,

> *Chic* argues that no ordinary reader would assume Mrs. Braun to be unchaste or promiscuous on the basis of its publication of her picture. Even if this were true, the jury might have found that the publication implied Mrs. Braun's approval of the opinions expressed in *Chic* or that it implied Mrs. Braun had consented to having her picture in *Chic*. Either of these findings would support the jury verdict that the publication placed Mrs. Braun in a false light highly offensive to a reasonable person.

Id. n. 11.

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Plaintiffs here cite *Braun* as support for their argument that the allegedly libelous material should be read in light of the entire April, 1986 issue of *Penthouse*. At first glance, "Chic Thrills and "Hard Times" appear quite similar, as both feature brief news oddities which often approach sexual innuendo. A primary difference exists between the two, however. "Hard Times" reprints material from other publications which is submitted by readers, while "Chic Thrills" was written originally for *Chic* Magazine. Thus it would be likely that the human subjects of "Chic Thrills" gave their permission to be featured in the magazine, while consent in the case of "Hard Times" is not so apparent. "Hard Times" is formatted like a newspaper, and each article lists its source. The story regarding Plaintiffs is followed by an acknowledgement that it was sent in by an Oregon reader. In addition, the subtitle of the feature notes that the included information is "culled from the nation's press." Because the layout and authorship of "Hard Times" lends itself to distinction from the rest of the magazine, the story in question should be read in light of the segment in which it appeared and not the complete issue of *Penthouse*.

This is in line with the more recent Fifth Circuit decision of *Faloona by Fredrickson v. Hustler Magazine, Inc.*, 799 F.2d 1000 (5th Cir. 1986). *Faloona* dealt with nude photos of Linda Fredrickson and her two children, a six-year old girl and a four-year old boy. In 1972 and 1973, the three posed for *The Sex Atlas*, a textbook on human sexuality. In 1977, the photos were used with Fredrickson's permission in *Mediations on the Gift of Sexuality*. At that time, Fredrickson asked the National Sex Forum, the organization behind the two books, not to use any more of the photos without first contacting her.

In 1978, *Hustler* purchased the right to publish a book review of *Mediations on the Gift of Sexuality* as well as an excerpt from

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The Sex Atlas. The November, 1978 issue of Hustler featured a two-page book review of *Mediations* including photographs, among others, of Fredrickson and her children. The December, 1978 issue contained an excerpt from *The Sex Atlas* accompanied by photos of the two children.

The plaintiffs in *Faloona*, much like Plaintiffs here, contended that the publication of their photos in *Hustler* placed them in a false light because their appearance suggested support of the magazine. Consequently, they claimed that the photographs should have been considered in terms of the entire issue of *Hustler* in which they appeared. The court disagreed, holding,

> It is obvious that the photographs were reproductions from the books being reviewed or excerpted. No tie to *Hustler* is claimed or suggested. It is this sharp definition of context which distinguishes this case from . . . *Braun.*

799 F.2d at 1007. As a result, the court affirmed the lower court's refusal of the false light claim.

Though *Braun's* "Chic Thrills" is on its face more closely akin to "Hard Times"'' than is the book review in *Faloona,* the *Faloona* analysis is appropriate here. The review in *Faloona* was written originally for *Penthouse,* but the challenged portion was an excerpt from the book, analogous to the reprinted items featured in "Hard Times." Unlike "Chic Thrills," "Hard Times" is a written in a tenor independent from other sections of the magazine, thus providing a "sharply-defined context" for the story in question.

It is the province of the Court to determine whether a

communication is capable of bearing a defamatory meaning, not to decide whether such meaning was conveyed. *Healey v. New England Newspapers, Inc.*, 520 A.2d 147, 151 (R.I. 1987). Restricting the construction of "little amazons" to the "Hard Times" feature, reasonable minds would be hard-pressed to find the phrase libelous. The accompanying article clearly characterizes the girls' "attack" as combative rather than sexual, reporting (in the words of the school principal), "They kick them in the shins, pull their hair, and kick them . . . well, in various painful places."

Certain headlines may in themselves cause an otherwise innocuous article to be libelous. *Empire Printing Co. v. Roden*, 247 F.2d 8 (9th Cir. 1957). The headline here, however, is akin to the jumpline in *McCabe*, about which the court noted,

> The jumpline, taken alone, made no reference to anyone. The only way to find out that it referred to [the plaintiffs] was to read the article. Having read the article, the reader would take the headline in context with the facts as spelled out in the body of the article.

814 F.2d at 843 n.3. Though it is conceivable that a reader would skim the headline and glance at the photo without reading the article, the elements involved cannot be separated. Taken with the photo and not the text, "Little Amazons Attack Boys" infers that the story is about the minor Plaintiffs, but means nothing. One must read the article to decipher the headline. This is in accord with *Lavin v. New York News*, 757 F.2d 1416 (3d Cir. 1985), in which the court was faced with a photo and news story entitled, "Best Cops Money Can Buy." The court refused to exclude the text from its consideration of whether the plaintiff had been libelled, stating, "The . . . headline, together with the photograph,

does implicate plaintiff, but its meaning is immediately clarified by the lead paragraph of the article." 757 F.2d at 1420-1421. Similarly, the use of "little amazons" is clearly discernable as wordplay, technically known as an oxymoron given the content of the article. Plaintiffs' libel claim therefore fails.

Plaintiffs also allege that Defendants have placed them in a false light. The false light aspect of invasion of privacy is set out in R.I. Gen. Laws § 9-1-28.1 (a) (4), which states,

> It is the policy of this state that every person in this state shall have a right to privacy which shall be defined to include
>
> (4) The right to be secure from publicity that reasonably places another in a false light before the public;
>
> (A) In order to recover for violation of this right, it must be established that:
>
> (i) There has been some publication of a false or fictitious fact which implies an association which does not exist;
>
> (ii) The association which has been published or implied would be objectionable to the ordinary reasonable man under the circumstances;
>
> (B) The fact which was disclosed need not be of any benefit to the discloser.

The gravamen of the tort is that the objectionable material be

false. Since the headline in question has been found to be constitutionally-protected opinion, it is impossible for it to be false. Thus, just as the book review in *Faloona* did not insinuate the plaintiffs' support of *Hustler*, the item now at issue cannot be interpreted as Plaintiffs' endorsement of the views espoused by *Penthouse*. Since Defendants have not placed Plaintiffs in a false light, Plaintiffs' invasion of privacy claim cannot stand.[2]

Plaintiffs ask this Court to take into consideration both the tender ages of the depicted girls and the nature of the magazine. As to the girls' minority, Plaintiffs cite R.I. Gen. Laws § 11-31-10, which prohibits the sale of sexually-explicit publications to minors. They claim that it would be contradictory to penalize Defendants for sale to minors but to allow Defendants to include minors in their publication. Such an assertion requires a giant leap in logic which this Court is not prepared to make. It is likewise not up to the Court to consider the tenor of the objectionable magazine. The First Circuit has noted that "sexually explicit but nonobscene materials, however distasteful, are entitled to no less protection than other forms of expression" *L.L. Bean, Inc. v. Drake Publishers, Inc.*, 811 F.2d 26, 34 (1st Cir. 1987) (quoting *Fantasy Book Shop v. City of Boston,* 652 F.2d 1115, 1126 (1st Cir. 1981)).

For the foregoing reasons, Defendant's motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(6) is granted.

IT IS SO ORDERED.

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2. Plaintiffs' claim of intentional infliction of emotional distress is also denied, as is Defendants' motion for sanctions pursuant to Fed.R.Civ.P. 11. Though Plaintiffs' claims have been denied, they do not rise to the level of frivolity necessary for imposition of Rule 11 sanctions.

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s/ Francis J. Boyle
Francis J. Boyle, Chief Judge
United States District Court
District of Rhode Island
June 4, 1987

APPENDIX C — REPORT AND RECOMMENDATION OF MAGISTRATE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF RHODE ISLAND

C.A. No. 86-0568B

LESLIE FUDGE, et al

v.

PENTHOUSE INTERNATIONAL, LTD., et al

HAGOPIAN, Magistrate. The instant matter was referred to the United States Magistrate for consideration pursuant to 28 U.S.C. §636(b)(1)(A);(B). The defendants, Penthouse International, Ltd., et al, move to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), alleging that the complaint fails to state a claim upon which relief can be granted.

Statement of Facts

The minor plaintiffs were photographed in connection with various news articles concerning the segregation of sexes during recess at the Oakland Beach Elementary School in Rhode Island, where they were students. The photograph and news articles were published by the Providence Journal Bulletin and Associated Press. Subsequently, defendants obtained a copy of the photograph and published it in the April 1986 issue of *Penthouse* under the headline "Little Amazons Attack Boys."

As a result of the publication in *Penthouse*, plaintiffs allege injury in a four count complaint encompassing intentional

infliction of emotional distress, outrage, false light, libel *per se* and libel *per quod*.

Discussion

In consideration of a motion to dismiss under Fed.R.Civ.P. 12(b)(6), the pleadings must be viewed in the light most favorable to the non-moving party, the plaintiffs in the matter before me. The burden is upon the moving party, here the defendants, to establish that the plaintiffs can prove no possible set of facts in support of their claim that would entitle them to relief. *Harper v. Cserr,* 544 F.2d 1121 (1st Cir. 1976). The allegations of the complaint are deemed admitted for the purposes of testing the sufficiency of the complaint on a Rule 12(b)(6) motion to dismiss, *Seveney v. United States Department of the Navy,* 550 F.Supp. 653 (D.R.I. 1982); *Kugler v. Helfant,* 421 U.S. 117, *reh'g. denied,* 421 U.S. 1017 (1975); *United States v. Mississippi,* 380 U.S. 128 (1965), and all inferences are to be resolved against the moving party, in favor of the non-moving party. *Gladstone Realtors v. Bellwood,* 99 S.Ct. 1601 (1979); *Scheuer v. Rhodes,* 94 S.Ct. 1683 (1974); *Murray v. City of Milford,* 380 F.2d 468 (1st Cir. 1967). Thus, the sole determination to be made in the matter before me is whether the allegations set forth in the complaint would under no circumstances entitle plaintiffs to relief. *Ricciotti v. Warwick School Committee,* 319 F.Supp. 1006 (D.R.I. 1970); *Ballou v. General Electric,* 393 F.2d 398 (1st Cir. 1968); *Conley v. Gibson,* 355 U.S. 41 (1957).

Plaintiffs first allege libel *per se* and *per quod* as result of labeling the minor plaintiffs as "Amazons." Defendants move to dismiss claiming, *inter alia,* that the term "Amazon" is neither false nor defamatory as a matter of law. Plaintiffs, however, have alleged that the term "Amazon" was published in the same issue

of *Penthouse* that plaintiffs appeared in to describe a female in a manner which clearly exceeds the bounds of the historical definition offered by defendants in support of their motion. Thus, it appears that the defendants have not shown beyond doubt that the plaintiffs can prove no set of facts in support of their claim which would entitle them to relief.

Similarly, plaintiffs' claims of false light and outrage cannot be defeated as a matter of law at this juncture. The threshold determination in a claim of false light, which is whether "there has been some publication of a false or fictitious fact which implies an association which does not exist," has not been defeated by defendants. The second prong in the analysis, which is whether, "the association which has been published or implied would be objectionable to the ordinary reasonable man under the circumstances," is a question of fact. R.I.G.L. 9-1-28.1(a)(4)(A)(i) and (ii). Additionally, whether defendants acted outrageously or intentionally with respect to the counts in the complaint is a question of fact.

As has already been stated, a motion to dismiss an action for failure to state a claim may be granted only if it appears beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Calhoun v. United States,* 475 F.Supp. 1, *aff'd.* (CA 9 Cal.), 604 F.2d 647, *cert. denied,* 444 U.S. 1078, 62 L. Ed. 2d 761, 100 S.Ct. 1029 (S.C. Cal. 1977).

I find, after consideration of the record particularly defendants' supporting arguments, that such burden has not been met by the movant; thus, the instant matter should pass to trial.

Appendix C

Recommendation

Defendants' motion to dismiss pursuant to Rule 12(b)(6) and for sanctions should be denied. I so recommend to the Court.

s/ Jacob Hagopian
JACOB HAGOPIAN
UNITED STATES MAGISTRATE

DATE: 23 Feb 1987

Any objections to this Recommendation must be filed with the Clerk of Court within 10 days of receipt of this notice. Failure to file objections within the specified time waives the right to appeal the District Court's order. See *Scott v. Schweiker,* 702 F.2d 13, 14 (1st Cir. 1983).

APPENDIX D — COMPLAINT

SUPERIOR COURT OF THE STATE OF RHODE ISLAND
KENT, SC.

LESLIE FUDGE, by her parents and next friends, SHARON FUDGE and GEORGE FUDGE; and SHARON FUDGE and GEORGE FUDGE; JENNIFER ANN MERRITT, by her parent and next friend, SANDRA M. MERRITT, and SANDRA M. MERRITT; TINA MARIE OLIVER, by her parents and next friends, ROGER OLIVER and CHRISTINE OLIVER, and ROGER OLIVER and CHRISTINE OLIVER; and RENEE VINCENT, by her parent and next friend ROSE ANN VINCENT and ROSE ANN VINCENT,

Plaintiffs,

vs.

PENTHOUSE INTERNATIONAL, LTD. and BOB GUCCIONE,

Defendants.

COMPLAINT

1. Plaintiffs Leslie Fudge (DOB: 2/5/75), Jennifer Ann Merritt (DOB: 3/24/74), Tina Marie Oliver (DOB: 8/21/77) and Renee Vincent (DOB: 9/6/74) are all minor children and residents of the City of Warwick, Kent County, Rhode Island;

2. Plaintiffs Sharon Fudge and George Fudge are married to each other and are residents of Warwick, Rhode Island, and they are the parents of plaintiff Leslie Fudge; plaintiffs Roger Oliver and Christine Oliver are married to each other and are residents of Warwick, Rhode Island, and they are the parents of Tina Marie Oliver; plaintiff Rose Ann Vincent is a resident

of Warwick, Rhode Island and is the mother of Renee Vincent; and plaintiff Sandra M. Merritt is a resident of Warwick, Rhode Island and is the mother of Jennifer Ann Merritt;

3. Defendant Penthouse International, Ltd. is a foreign corporation which, on information and belief, is chartered under the laws of the State of New York, and it has its principl place of business at 1965 Broadway, New York, New York, 10023-5965; and its principal business is the publication of a magazine known as "Penthouse: The International Magazine for Men," which magazine is published on a monthly basis and retailed for Three Dollars and 50/100 ($3.50) per copy;

4. Defendant Bob Guccione is, on information and belief, the principal shareholder in defendant Penthouse International, Ltd. and on information and belief is a resident of the State of New York; defendant Guccione is the editor and publisher of "Penthouse: The International Magazine for Men," and as such makes the final determinations on all materials, both written and photographic, that will appear in any issue of *Penthouse Magazine* and he is also the ultimate decision maker regarding the marketing, distribution and promotion of "Penthouse: The International Magazine for Men", hereinafter referred to by its full title or as "Penthouse;"

5. Defendant Penthouse International, Ltd. maintains and has access to a distribution network that includes the State of Rhode Island so that each month, the monthly issue of *Penthouse* is sold throughout retail stores in Rhode Island and, on information and belief, *Penthouse Magazine* has subscribers residing in Rhode Island who receive *Penthouse* through the mail each month; and in fact, the defendants have for a period of years maintained a distribution network so that *Penthouse* could

be sold every month through various stores and outlets in the State of Rhode Island;

Facts of the Case

6. On or about November, 1985, your minor plaintiffs were all students in the Oakland Beach Elementary School in Warwick, Rhode Island when, because of some apparent conflicts between some of the male students and some of the girl students in that school, the principal decided to segregate the sexes during recess periods; and this decision on the part of the principal became the subject of news stories by the Associated Press and the *Providence Journal Bulletin,* and on or about November 9th and other dates, 1985, the *Providence Journal Bulletin* published articles about the situation regarding the recess periods at the Oakland Beach Elementary School, and also published a photograph depicting your four minor plaintiffs giving a so-called "thumbs-down" gesture to signify their disagreement with the principal's decision to segregate the students by sex during recess periods;

7. At some time prior to April 1, 1986, defendants Penthouse International, Ltd. and Bob Guccione obtained a copy of the picture and made a determination to place the picture, accompanied by a narrative, in the April 1986 issue of "Penthouse: The International Magazine for Men;"

8. In fact, in the April 1986 issue of *Penthouse*, the defendants caused to be printed and reproduced a slightly cropped version of the photograph that had appeared on November 9, 1985, in the *Providence Journal Bulletin,* and your minor plaintiffs are clearly identifiable in the photograph, with the exception of plaintiff Leslie Fudge, who is identifiable by reference to the

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photograph that appeared in the *Providence Journal Bulletin;*

9. The photograph in question appears as page 144 of the April 1986 issue of Penthouse and appears under the bold-print headline "Little Amazons Attack Boys;"

10. In the same issue, at page 72, in an article titled "Good Vibrations," written by one Al Goldstein, an "amazon" is defined as a sexually aggressive and insatiable female whose desires can only be quelled and satisfied by inserting a vibrator into her vagina;

11. Throughout the April 1986 issue of "Penthouse: The International Magazine for Men" there are numerous written descriptions of sexual intercourse and other sexual activities as well as many photographs of naked men and women, photographs of both the male and female genitalia, and photographs of men and women together engaging in sexual activity, including fellatio and cunnilingus;

Causes of Action

12. The labeling by the defendants of your minor plaintiffs as "Amazons" constitutes libel per se in that the term imputes to them, as girls of elementary school age, criminality in the form of sexual activity, and a lack of chastity, when, in fact, they are chaste; and the word "amazon" also libels your minor plaintiffs in that the word has historically had, and presently has, the connotations of "masculine woman" and "shrew," and the defendants intentionally decided and determined to cast your minor plaintiffs in this context, which bears no relation to the truth, as none of your minor plaintiffs have any characteristics inappropriate to their sex and age group; and as a result of the libel *per se* , your plaintiffs sustained damages which, as a matter

of law, they need not prove specifically, and to the extent that they were damaged by the libel *per quod* of the defendants, your minor plaintiffs were physically and psychologically distressed and experienced pain and suffering of body and mind as a result of the actions of the defendants.

WHEREFORE, your minor plaintiffs, through their parents, each demand judgment against the defendants in the amount of Five Hundred Thousand Dollars ($500,000.00) (total Two Million Dollars), plus interest and costs.

Count II

13. Plaintiffs reallege paragraphs 1 through 11, as if copied at length herein, and make them part of this, the second count of their Complaint;

14. The presentation, publication, and display of the photographs of the minor plaintiffs, along with the accompanying narrative and description of them as "Little Amazons" in the April 1986 issue of *Penthouse* by the defendants unlawfully presents them in a "false light" as proscribed by R.I.G.L. 9-1-28.1 *et. seq.* in that a photograph of your plaintiffs is presented in a magazine that by its own definition and admission is "The International Magazine for Men," which magazine contains extensive descriptions and numerous photographs of sexual activity, including fellatio and cunnilingus, and naked males and females, including numerous close-up photographs of genitals, and your plaintiffs declare that the April 1986 issue of *Penthouse* is obscene as defined in R.I.G.L. 11-31-1 *et. seq.*; and therefore, in publishing the photograph and accompanying article, your defendants cast the plaintiffs in a "false light" by (a) presenting your minor plaintiffs in a magazine that is legally obscene, or

if not legally obscene, is geared, oriented and marketed to an adult male audience interested in reading about and looking at pictures pertaining to sexual activity, and neither the minor plaintiffs or adult plaintiffs consented to the use of the photograph and accompanying text nor do any of the plaintiffs subscribe to the predominant editorial viewpoints of *Penthouse*, especially its views of women; (b) and, further, your minor plaintiffs were cast in a "false light" because in point of fact your minor plaintiffs objected to their being segregated from males during school recess periods, which was a large point of the Associated Press story about the situation at their school and which is the point of their thumbs being turned down in the photograph, but this was entirely neglected by defendants in their presentation of the picture along with their own text and reference to "Little Amazons;"

15. The publication of the photograph and accompanying text complained of herein implies an association on the part of the minor plaintiffs and also the parent plaintiffs with *Penthouse Magazine,* the defendants and their philosophy and views which does not exist also implies that the minor plaintiffs are masculine in nature and also that the minor plaintiffs wish to dominate and subdue their male school companions, none of which is true, and an ordinary, reasonable person under these circumstances would not want to be depicted in such a light in such a magazine as *Penthouse.*

WHEREFORE, your minor plaintiffs pray that this Court award each of them a judgment against the defendants in the amount of Five Hundred Thousand Dollars ($500,00.00), for a total of Two Million Dollars ($2,000,000.00); and each adult plaintiff herein prays that he or she be awarded a judgment in the amount of Five Hundred Thousand Dollars ($500,000.00) against the defendants (total demand of adult plaintiffs is Three

Million Dollars); and additionally, all plaintiffs, both minor plaintiffs bringing this action through their parents, and all the adult plaintiffs, demand the judgment for their reasonable attorney's fees and costs.

Count III

16. Plaintiffs reallege paragraphs 1 through 12 and also paragraphs 13 through 15 as if copied at length herein, and incorporate them in this, their third Count;

17. Defendants knew, or should have known, that the publication of pictures of your minor plaintiffs in a so-called men's magazine, amidst textual and photographic material dealing primarily with explicit and graphic descriptions of sexual activity, including intercourse, fellatio and cunnilingus, as well as photographs treating of the same subject matter as well as close-up photographs of both male and female genitalia, some in a state of sexual arousal and some photos suggesting or depicting masturbation, would necessarily offend, embarrass, shock and outrage both the parents of the children whose photographs appeared in the magazine as well as the children themselves upon being confronted by people who saw or heard about their pictures appearing in "Penthouse: The International Magazine for Men;" and in fact, as a result of the defendants' intentional, reckless and outrageous determination to publish photographs of the minor plaintiffs with an accompanying text, all your plaintiffs, both the minors and their parents named herein, have suffered embarrassment, humiliation and shame, have experienced physical pain and upset, and have also experienced great pain and suffering of body and mind as a result of the public distribution of this photograph in the April 1986 issue of *Penthouse Magazine.*

Appendix D

WHEREFORE, your minor plaintiffs, bringing this suit through their parents and next friends, each demand judgment against the defendants in the amount of Five Hundred Thousand Dollars ($500,000.00) (for a total of Two Million Dollars); and each adult plaintiff, bringing suit in his or her own right, demands judgment against the defendants in the amount of Five Hundred Thousand Dollars ($500,000.00) (for a total of Three Million Dollars); plus their interest and costs.

COUNT IV

18. Plaintiffs reallege paragraphs 1 through 17 as if copied at length herein and incorporate them in this fourth Count of their Complaint;

19. Because the publication of the photograph and the publication of the accompanying text was done intentionally by the plaintiffs and with a reckless disregard of the truth and of the physical and psychologial well being of your plaintiffs, and because defendants knew they were publishing a falsehood that would cast all your plaintiffs in a "false light" regarding their viewpoints and behavior concerning equality between the sexes in the elementary school age group and also their views regarding family life and the appropriateness of girls of elementary school age having their photographs displayed in "Penthouse: The International Magazine for Men," and because defendants knew or should have known that persons of ordinary sensibilities would be outraged and physically and emotionally upset at having photographs of their elementary school age children depicted in a magazine devoted to graphic descriptions and photographs of naked adults and adult sexuality, but defendants nonetheless caused said photographs and accompanying text to be published, your plaintiffs therefore seek punitive and exemplary damages

in the amount of Two Hundred Fifty Thousand Dollars ($250,000.00) for each minor plaintiff and for each adult plaintiff, (for an aggregate of 2.5 million dollars in punitive damages, in addition to the compensatory damages demanded in the preceding Counts) plus interest and costs.

Plaintiffs
By and through their Attorney,

s/ Stephen J. Fortunato, Jr.
LOVETT, SCHEFRIN &
GALLOGLY, LTD.
Two Thomas Street
Providence, Rhode Island 02903

Plaintiffs demand a trial by jury.

s/ Stephen J. Fortunato, Jr.

Dated: August 25, 1986

Supreme Court, U.S.
FILED
JUN 24 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1940

In the

Supreme Court of the United States

OCTOBER TERM, 1987

LESLIE FUDGE, by her parents and next friends, SHARON FUDGE and GEORGE FUDGE; and SHARON FUDGE and GEORGE FUDGE; JENNIFER ANN MERRITT, by her parent and next friend, SANDRA M. MERRITT; and SANDRA M. MERRITT; TINA MARIE OLIVER, by her parents and next friends, ROGER OLIVER and CHRISTINE OLIVER; and RENEE VINCENT, by her parent and next friend ROSE ANN VINCENT; and ROSE ANN VINCENT,

Petitioners,

vs.

PENTHOUSE INTERNATIONAL, LTD. and BOB GUCCIONE,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION

JEFFREY H. DAICHMAN
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QUESTIONS PRESENTED

1. Does a publisher forfeit his First Amendment right to comment upon a newsworthy item because some of the subjects of the item happen to be children?

2. Can petitioners state a cause of action against a magazine and its publisher solely because they are dissatisfied with the sexual nature of other parts of the magazine totally unrelated to the news item in which they appear?

3. Can petitioners state claims for libel, "false light" invasion of privacy and intentional infliction of emotional distress against a magazine which merely reprints a newsworthy article previously appearing in the national news media?

4. Does the oxymoron "Little Amazons" used in the context of a newsworthy article to describe the aggressive behavior of the female minor petitioners constitute a protected expression of opinion under the facts and circumstances of this case?

5. Should this Court review petitioners' claims of invasion of privacy and intentional infliction of emotional distress when both claims were dismissed because they failed to satisfy the requirements of state law?

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In the

Supreme Court of the United States

OCTOBER TERM, 1987

LESLIE FUDGE, by her parents and next friends, SHARON FUDGE and GEORGE FUDGE; and SHARON FUDGE and GEORGE FUDGE; JENNIFER ANN MERRITT, by her parent and next friend, SANDRA M. MERRITT; and SANDRA M. MERRITT; TINA MARIE OLIVER, by her parents and next friends, ROGER OLIVER and CHRISTINE OLIVER; and RENEE VINCENT, by her parent and next friend ROSE ANN VINCENT; and ROSE ANN VINCENT,

Petitioners,

vs.

PENTHOUSE INTERNATIONAL, LTD. and BOB GUCCIONE,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION

Respondents Penthouse International, Ltd. and Bob Guccione ("Penthouse") respectfully request that this Court deny the petition for a writ of certiorari to review the unanimous decision of the United States Court of Appeals for the First Circuit entered on March 1, 1988.

Statement of the Case

The petition filed in this case raises no issue worthy of review by this Court. Petitioners admit that they became embroiled in a controversy created by their school principal's decision to segregate the sexes during recess periods due to the aggressive behavior displayed by the girls toward the boys. Petitioners volunteered interviews to the

press and posed for a photograph showing them giving the "thumbs-down" gesture to express their dissatisfaction with the school policy.

The articles about this controversy which first appeared in the local Rhode Island newspapers spawned a flurry of national media attention, and the story was thereafter carried on the national wire services and on national radio and television stations. Included in the national dissemination of this news story were interviews with some of the petitioners and the photograph described above.

In the "Hard Times" section of the April 1986 issue of Penthouse Magazine, Penthouse reproduced the photograph and story about petitioner's school controversy that appeared in a local Oregon newspaper and was sent to Penthouse by an Oregon reader. Penthouse only added the headline "Little Amazons Attack Boys" and a brief editorial comment (the entire text of the item as it appeared in Penthouse Magazine is quoted at p. 5 of the petition).

The monthly "Hard Times" section of Penthouse Magazine appears in a newspaper format and describes itself as a "compendium" of items "culled from the nation's press." It thus signals the reader that it consists of reprints from other publications, each of which is attributed to a source, and at the end of the column contains an "Editor's Note" which solicits readers to send clippings to Penthouse's office in New York.

Petitioners never sued the Providence Journal Bulletin, CBS, NBC, the AP or the UPI, or any of the other numerous television and radio stations which reported on the school controversy. Nor did petitioners lodge any protest, cry of outrage or complaint about the publicity and media attention they attracted or about the wide dissemination of their story.

The only complaint which resulted was that filed by petitioners against Penthouse. Seeking to exploit the sexual

content of other, unrelated portions of the publication, petitioners urged that they were emotionally distressed and placed in a "false light" by their unauthorized appearance in Penthouse Magazine. Petitioners' complaint necessarily failed, however, not only because of the constitutional protection accorded to expressions of opinion, but because of Penthouse's fundamental entitlement to report and comment on newsworthy matters, guaranteed by the same First Amendment rights enjoyed by any other publication. Penthouse does not forfeit its constitutional freedoms because of the nature of its magazine, nor because the subjects of news happen to be children.

Moreover, petitioners' argument that the sexual nature of the magazine must be considered is cast only in the context of the "false light" and outrage claims. But both of these claims were decided by applying state law, and the Court of Appeals expressly stated that it need not reach the constitutional defenses applicable to those claims. 840 F.2d at 1020 n. 5 and 1021 n. 6. Thus, as to these issues, this is not a case of a constitutional limitation superimposed upon state law, but an instance of petitioners' failure to meet the requirements of state law in order to sustain claims for privacy and outrage.

The only constitutional issue addressed by the Court of Appeals was the opinion doctrine as it applied to petitioners' allegations of libel. Yet petitioners' provide no reason for reviewing the unexceptional application of that doctrine which required dismissal of their defamation claim.

REASONS FOR DENYING THE WRIT

I.

There is no conflict in the circuits concerning the prohibition against considering unrelated parts of a magazine in determining whether petitioners have stated a claim for "false light" invasion of privacy or outrage.

Petitioners urge that the sexual content of Penthouse Magazine, albeit unrelated to the news items in question, is relevant to their contention that they have been placed in a "false light" and have suffered emotional distress. As noted, however, the Court of Appeals did not reach the constitutional defenses applicable to these claims, but dismissed each solely as a matter of state law.

Addressing the "false light" privacy claim, the Court of Appeals construed the Rhode Island privacy statute, R.I. Gen. Law §9-1-28.1(a)(4), to conclude that petitioners failed to demonstrate that the news item was capable of implying an objectionable association. 840 F.2d at 1017-20. Addressing the emotional distress claim under Rhode Island common law, the Court of Appeals concluded that the mere republication of the photograph and news item about petitioners was not so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. 840 F.2d at 1020-21. Petitioners' failure to satisfy state standards for liability accordingly presents no question for this Court to review.

Nevertheless, it should be noted that petitioners' effort to create a conflict between the First Circuit's opinion below and the Fifth Circuit's decision in *Braun v. Flynt*, 726 F.2d 245 (5th Cir.), *cert. denied*, 469 U.S. 883 (1984), is entirely misplaced. In *Braun*, an editor of *Chic* Magazine obtained a picture by the false pretense of representing his

publication as a fashion and travel magazine rather than a sexually explicit men's magazine. 726 F.2d at 247. Moreover, the court in *Braun* held that plaintiff had established a privacy claim under Texas law which did not infringe constitutional protections. In this case, by contrast, petitioners have failed to state a claim under Rhode Island's privacy statute, so that the constitutional issue was never even reached.

Interpreting Texas law, the court in *Braun* concluded that "the jury might have found that the publication implied Mrs. Braun's approval of the opinions expressed in *Chic* or that it implied Mrs. Braun had consented to having her picture in *Chic*." *Id.* at 254 n. 11. No such implication of endorsement was found in this case due to the nature of the "Hard Times" column of Penthouse Magazine. As the Court of Appeals observed, that column was described as a compendium of items "culled from the nation's press," the article itself was "clearly labeled as having been taken from a newspaper and submitted by an Oregon reader," and "*Penthouse's* editor clearly distinguished between his own comment upon the story and the story itself." 840 F.2d at 1019.

Petitioners urge that a conflict exists between the First and Fifth Circuits because in *Braun* the entire magazine was introduced into evidence. However, no conflict could possibly exist because the First Circuit in this case was construing the Rhode Island privacy statute and the Fifth Circuit in the *Braun* case was interpreting the Texas common law right of privacy. Moreover, petitioners notably omit mentioning the more recent Fifth Circuit case of *Faloona v. Hustler Magazine, Inc.*, 799 F.2d 1000 (5th Cir. 1986), *cert. denied*, ___ U.S. ___, 107 S.Ct. 1295 (1987), which categorically rejects petitioners' view of *Braun*, explaining that "our inquiry surrounding the context within which the photograph there appeared was focused on the 'Chic Thrills' section of *Chic* in which it was

published. We did not evaluate the entire magazine." 799 F.2d 16 1006.*

The Fifth Circuit in *Faloona* expressly referred to the district court's similar distinction of *Braun*, followed by its explanation of the fundamental proposition that "there is no right of privacy merely because a person's photograph or name appears in a magazine whose content is objectionable to that person." 607 F. Supp. 1341, 1356 n. 48 (N.D. Tex. 1985). Despite petitioners' dissatisfaction with Penthouse Magazine, their protestations cannot overcome the fundamental First Amendment right of all publications to equally enjoy the protection of free speech. *Winters v. New York*, 333 U.S. 507, 510 (1947). Accord, *L.L. Bean, Inc. v. Drake Publishers, Inc.*, 811 F.2d 26, 33-34 (1st Cir. 1987); *Brewer v. Hustler Magazine, Inc.*, 749 F.2d 527 (9th Cir. 1984); *Lerman v. Flynt Distributing Co.*, 745 F.2d 123, 138 (2d Cir. 1984), *cert. denied*, 471 U.S. 1054 (1985); *Pring v. Penthouse International, Ltd.*, 695 F.2d 438, 443 (10th Cir. 1982), *cert. denied*, 462 U.S. 1132 (1983).

II.

The "tender years" of the petitioners does not require a magazine to forfeit its First Amendment right to comment upon matters of public interest.

Petitioners offer the unprecedented and unsupported argument that a parent's right to protect the interests of his children somehow creates a cause of action not heretofore recognized by state law. Measured by the authorities cited, petitioners have confused constitutional restrictions upon governmental conduct with the First Amendment freedoms available to all citizens.

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* Perhaps this explains why petitioners never annexed either the article in question or Penthouse's "Hard Times" column to their complaint, and objected to its consideration by the Court of Appeals. There is nothing in the article or column of a sexually explicit nature.

Thus, a housing ordinance was declared unconstitutional in *Moore v. East Cleveland*, 431 U.S. 494, 499 (1977), because it amounted to intrusive regulation of the family. This case, however, does not implicate state action in any way, so that the due process clause cannot be used to challenge Penthouse's constitutional right to publish a legitimate news item about petitioners.

Likewise, the statutory restriction on the sale of adult magazines to minors reviewed in *Ginsberg v. New York*, 390 U.S. 629 (1969), does not raise any issue relevant to this case. The argument at pp. 15-16 of the petition represents nothing more than a plea to the Rhode Island Legislature to enact a statute that would afford them a remedy under the facts of this case—but such an argument is not properly made to this Court. In any event, such a statute would be unconstitutional, for the answer to the rhetorical question raised at p. 16 of the petition (what right does Penthouse have to publish a story about petitioners?) is the same right enjoyed by the local Rhode Island newspapers, the AP, UPI and news media across the country to cover a story about newsworthy subjects.

In *Faloona v. Hustler Magazine, Inc., supra*, the plaintiffs were only seven and five years of age when their photographs were taken. Yet neither the district court nor the Fifth Circuit suggested that a different analysis should apply to the magazine's constitutional rights because the plaintiffs were young children. That case was dismissed even though the plaintiffs were neither public figures nor participants in any public controversy.

That petitioners may have feelings of ourage and humiliation at seeing their story in Penthouse Magazine does not confer upon them a cause of action which would render Penthouse liable under any theory of state law. Having lost on their claims of privacy and outrage on state law grounds, their petition to this Court is unfounded.

III.

The dismissal of petitioners' claim for intentional infliction of emotional distress was not on the basis of constitutional considerations, but solely on the basis of state law.

The petitioners call upon this Court to decide an issue not present in this case—whether the recent decision in *Hustler Magazine v. Falwell,* 108 S.Ct. 876 (1988), applies to private figures.*

The *Falwell* decision imposed a constitutional limitation upon the ability of public figures to recover for the tort of intentional infliction of emotional distress. In that case, Falwell had recovered damages under state law which were ultimately held to be proscribed by constitutional principles. On the other hand, here, petitioners' claim was rejected under state law, with the Court of Appeals holding that under Rhode Island law the "reprinting of relatively innocuous news items or photographs that have already appeared in other media simply cannot be characterized as exceeding all possible bounds of decency, atrocious or utterly intolerable in a civilized community." 840 F.2d at 1021. For that reason, the constitutional defenses raised by Penthouse were never reached by the First Circuit. *Id.* at 1021 n. 6. Indeed, the First Circuit did not require petitioners to prove a false statement of fact or actual malice to support their outrage claim (as this Court in *Falwell* held was required of public figures), but instead found that the facts pleaded did not meet applicable state law standards.

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* Petitioners' own description of their voluntary participation in the debate concerning the segregation of sexes during recess periods at their elementary school, and their efforts to influence the outcome of that controversy by expressing their dissatisfaction with school policy, fits squarely within the classic formulation of a limited purpose public figure. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345, 351 (1974).

Ironically, the *only* issues raised in the petition relate to claims of "false light" privacy and outrage—both of which were dismissed as a matter of state law without reaching the constitutional questions. The *only* constitutional issue decided by the Court of Appeals was its application of the opinion doctrine to the libel claim, 840 F.2d 1015-17, yet the petition raises no direct challenge to that determination.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted,

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June 24, 1988